DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-864
Title: Comcast Corporation, et al., Petitioners
v.
Caroline Behrend, et al.
Docketed: January 12, 2012
Linked with 11A534
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (10-2865)
Decision Date: August 23, 2011
Rehearing Denied: September 20, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 30 2011	Application (11A534) to extend the time to file a petition for a writ of certiorari from December 19, 2011 to January 18, 2012, submitted to Justice Alito.
Dec 2 2011	Application (11A534) granted by Justice Alito extending the time to file until January 18, 2012.
Jan 11 2012	Petition for a writ of certiorari filed. (Response due February 13, 2012)
Feb 13 2012	Waiver of right of respondents Caroline Behrend, et al. to respond filed.
Feb 29 2012	DISTRIBUTED for Conference of March 16, 2012.
Mar 8 2012	Response Requested. (Due April 9, 2012)
Apr 9 2012	Brief of respondents Caroline Behrend, et al. in opposition filed.
Apr 24 2012	DISTRIBUTED for Conference of May 10, 2012.
Apr 24 2012	Reply of petitioners Comcast Corporation, et al. filed. (Distributed)
May 14 2012	DISTRIBUTED for Conference of May 17, 2012.
May 21 2012	DISTRIBUTED for Conference of May 24, 2012.
May 29 2012	DISTRIBUTED for Conference of May 31, 2012.
Jun 4 2012	DISTRIBUTED for Conference of June 7, 2012.
Jun 11 2012	DISTRIBUTED for Conference of June 14, 2012.
Jun 18 2012	DISTRIBUTED for Conference of June 21, 2012.
Jun 25 2012	Petition GRANTED limited to the following Question: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."
Jul 20 2012	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 17, 2012.
Jul 23 2012	SET FOR ARGUMENT ON Monday, November 5, 2012.

Aug 6 2012	Letter from counsel for the respondents received. (Distributed)
Aug 7 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Aug 9 2012	Record received from U.S.C.A. for 3rd Circuit. (1 box). There are sealed documents in this record.
Aug 14 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Aug 17 2012	Joint appendix filed (5 Volumes, 2 with motion to seal). (Statement of costs filed)
Aug 17 2012	Brief of petitioner Comcast Corporation, et al. filed.
Aug 17 2012	Motion to file Volumes Four and Five of the joint appendix under seal filed by petitioners Comcast Corporation, et al.
Aug 22 2012	Motion DISTRIBUTED for Conference of September 24, 2012.
Aug 22 2012	The time to file respondent's brief on the merits is extended to and including September 25, 2012.
Aug 24 2012	Brief amicus curiae of Intel Corporation filed.
Aug 24 2012	Brief amicus curiae of Equal Employment Advisory Council filed.
Aug 24 2012	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Aug 24 2012	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Aug 24 2012	Brief amici curiae of Washington Legal Foundation, et al. filed.
Aug 24 2012	Brief amicus curiae of Retail Litigation Center, Inc. filed.
Aug 24 2012	Brief amicus curiae of Cato Institute filed.
Aug 24 2012	Brief amici curiae of Economists in support of neither party filed.
Sep 4 2012	Record received from U.S.D.C. for Eastern District of Pennsylvania. (3 boxes)
Sep 19 2012	CIRCULATED
Sep 25 2012	Brief of respondents Caroline Behrend, et al. filed. (Distributed)
Sep 26 2012	Letter of respondents Caroline Behrend, et al. filed. (Distributed)
Oct 1 2012	Motion for leave to file Volumes 4 and 5 of the joint appendix under seal GRANTED.
Oct 2 2012	Brief amici curiae of American Antitrust Institute, et al. filed. (Distributed)
Oct 2 2012	Brief amici curiae of American Association for Justice, Public Justice, P.C., and AARP filed. (Distributed)
Oct 24 2012	Reply of petitioners Comcast Corporation, et al. filed. (Distributed)
Oct 29 2012	Motion for leave to file a supplemental volume of the joint appendix under seal filed by petitioners Comcast Corporation, et al. (Distributed)
Oct 29 2012	Motion DISTRIBUTED for Conference of November 2, 2012.
Nov 2 2012	Motion for leave to file a supplemental volume of the joint appendix under seal GRANTED.
Nov 5 2012	Argued. For petitioners: Miguel A. Estrada, Washington, D. C. For respondents: Barry Barnett, Dallas, Tex.

PETITION FOR WRIT OF CERTIORARI

11-864

No.

IN THE

Supreme Court of the United States

COMCAST CORPORATION,
COMCAST HOLDINGS CORPORATION,
COMCAST CABLE COMMUNICATIONS, INC.,
COMCAST CABLE COMMUNICATIONS HOLDINGS, INC.,
AND COMCAST CABLE HOLDINGS, LLC,

Petitioners,

v.

CAROLINE BEHREND, STANFORD GLABERSON,
JOAN EVANCHUK-KIND, AND ERIC BRISLAWN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court recently reiterated that district courts must engage in a "'rigorous analysis'" to ensure that the "party seeking class certification [can] affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982)). Disavowing an allegedly contrary suggestion in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), *Dukes* emphasized that district courts are required to resolve any "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [those issues] *again* at trial in order to make out their case on the merits." 131 S. Ct. at 2552 n.6. In this case, however, the Third Circuit repeatedly invoked the disavowed aspect of *Eisen* in declining to consider several "merits arguments" directly relevant to the certification analysis.

The question presented is whether a district court may certify a class action without resolving "merits arguments" that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Andrew Behrend, Caroline Cutler, Marc Dambrosio, Michael Kellman, Lawrence Rudman, Kenneth Saffren, Marc Weinberg, and Barbi J. Weinberg were plaintiffs in the district court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Comcast Corporation is the parent company of petitioners Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC, and no other publicly held company owns 10% or more of their stock. Comcast Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-88a) is reported at 655 F.3d 182. The opinion of the district court (App., *infra*, 89a-188a) is reported at 264 F.R.D. 150; an amended order (App., *infra*, 189a-194a) is unpublished. The order of the court of appeals denying rehearing en banc (*id.* at 195a-196a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. A timely petition for rehearing en banc was denied on September 20, 2011. Justice Alito extended the time in which to file a petition for a writ of certiorari to and including January 18, 2012. *See* No. 11A534. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in the Appendix, *infra*, at 197a-204a.

STATEMENT

A district court may certify a class action under Federal Rule of Civil Procedure 23(b)(3) only if the plaintiff establishes numerosity, commonality, typicality, and adequacy, and, in addition, "the court

finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." In *Wal-Mart Stores, Inc.* v. *Dukes*, this Court held that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis,'" that the requirements for class certification "'have been satisfied'"—an inquiry that "[f]requently" will "entail some overlap with the merits of the plaintiff's underlying claim." 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982)). Although some courts had "mistakenly" read a statement in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), as adopting a contrary approach, *Dukes* clarified that this statement was "the purest dictum" and "contradicted by [the Court's] other cases," 131 S. Ct. at 2552 n.6. Thus, the Court emphasized, district courts are required to resolve "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." *Ibid.*

In this case, however, the Third Circuit affirmed a district court's certification order after expressly declining to consider several "merits" issues necessary to determine whether, as required by Rule 23(b)(3), common questions predominate over individual ones. Declaring that *Dukes* "neither guide[d] nor govern[ed] the dispute before [it]," the Third Circuit instead invoked *Eisen*, which it believed to "preclud[e] any further inquiry" into the merits. App., *infra*, 33a, 41a n.12. The Third Circuit's view that "merits arguments" are "not properly before [the court]" at the class certification stage (*id.* at 19a) cannot be reconciled with this Court's decision in *Dukes* and breaks sharply with the Eighth and Ninth Circuits, which have correctly recognized that such

limitations on review of "merits" issues at the certification stage are no longer supportable after *Dukes*.

This Court should summarily reverse in light of *Dukes*, which leaves no room for lower courts to resuscitate now-extinguished portions of *Eisen*. At minimum, the Court should grant review to clarify whether, and to what extent, lower courts must resolve any issues bearing on class certification, even if those issues might also be relevant to the merits of the plaintiff's claims.

1. Comcast is a media, entertainment, and communications company and a provider of cable services to residential and business customers; Plaintiffs purport to represent a class of more than two million present and former Comcast cable subscribers in the Philadelphia area. App., *infra*, 6a; *see also* C.A. J.A. 217 ¶ 32. Claiming that they pay too much for cable, Plaintiffs brought suit in the Eastern District of Pennsylvania. App., *infra*, 5a, 7a. They allege that Comcast monopolized Philadelphia's cable market and excluded competition in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. App., *infra*, 5a.[1]

According to Plaintiffs, Comcast engaged in "anticompetitive 'clustering.'" App., *infra*, 6a. "'Clustering' refers to a 'strategy whereby cable [operators]

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[1] The operative complaint alleges comparable violations in the Chicago cable market. App., *infra*, 5a-6a. Plaintiffs' counsel also raised similar allegations with respect to the Boston market in a complaint that has now been transferred from the District of Massachusetts to the Eastern District of Pennsylvania. *Id.* at 8a n.5. Resolution of the Chicago and Boston claims has been stayed pending resolution of the Philadelphia claims. *Id.* at 8a & n.5.

concentrate their operations in regional geographic areas by acquiring cable systems in regions where the [operator] already has a significant presence, while giving up other holdings scattered across the country.'" *Ibid.* (quoting *In re Implementation of the Cable Tel. Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd. 17791, 17810 n.134 (2007)). As the FCC has acknowledged, clustering is a common practice in the cable industry that can provide various pro-competitive benefits for the markets at issue. *See In re Adelphia Commc'ns Corp.*, 21 FCC Rcd. 8203, 8318 (2006).

Clustering is accomplished "through purchases and sales of cable systems, or by system 'swapping' among [operators]." App., *infra*, 7a (quoting 22 FCC Rcd. at 17810 n.134) (internal quotation marks omitted). Comcast is alleged to have done both—acquisitions and swaps—through which it eventually controlled a 69.5% share of subscribers in the Philadelphia Designated Marketing Area ("DMA"), which includes the city of Philadelphia and surrounding counties. *Id.* at 3a-5a & n.2.[2]

Although the transactions at issue were vetted and approved by the Federal Communications Commission and federal antitrust authorities, Plaintiffs claim that those transactions were designed to "eliminat[e] competition, rais[e] entry barriers to potential

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[2] A DMA is a "specific media research area that is used by Nielsen Media Research to identify television stations whose *broadcast* signals reach a specific area and attract the most viewers," which in turn is "used by all types of companies to target and keep track of advertising." App., *infra*, 3a n.1 (quoting *Steak n Shake Co.* v. *Burger King Corp.*, 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004)) (internal quotation marks omitted; emphasis added).

competition, maintai[n] increased prices for cable services at supra-competitive levels, and depriv[e] subscribers of the lower prices that would result from effective competition." App., *infra*, 7a. To prevail on their claims, Plaintiffs are required to prove "(1) a violation of the antitrust laws (here, sections 1 and 2 of the Sherman Act), (2) individual injury resulting from that violation [*i.e.*, so-called 'antitrust impact'], and (3) measurable damages." *Id.* at 15a.

2. The district court certified the class under Rule 23(b)(3) after concluding, as relevant here, "that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis." App., *infra*, 91a.

Although Plaintiffs offered four theories of antitrust impact, the district court rejected three of those theories in ruling on the motion for class certification. App., *infra*, 122a, 153a, 161a-162a; *see also id.* at 24a. The sole remaining theory is that Comcast's clustering deterred competition from so-called "overbuilders." *Id.* at 91a. Overbuilders are companies that "offer a competitive alternative where a telecommunications company already operates." *Id.* at 7a. Plaintiffs maintain that, in the absence of clustering, overbuilders would have extended their telecommunications services into areas serviced by Comcast. *Ibid.* Thus, the district court explained, "[p]roof of antitrust impact ... shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." *Id.* at 192a-193a.

Plaintiffs' theory of antitrust impact depends on three critical propositions: (1) that the Philadelphia DMA is the relevant geographic market in which to analyze Comcast's alleged market power; (2) that Comcast's clustering deterred competition by overbuilders who would otherwise have entered that market; and (3) that the deterred competition resulted in antitrust impact across the entire class. *See, e.g.*, App., *infra*, 97a-99a. Comcast adduced evidence disputing that these propositions are appropriately subject to resolution in a class action.

Comcast argued that Plaintiffs' theory of how individuals were injured—"antitrust impact"—could not be established through class-wide proof because the Philadelphia DMA was not a relevant geographic market for assessing Plaintiffs' claims. Indeed, Comcast noted, the relevant market is much smaller: "[A]n individual can choose only among providers offering video programming services to his household," even if other providers offer services elsewhere in the DMA. App., *infra*, 17a; *see also supra* at 4 n.2 (noting that the DMA is defined by *broadcast*, not cable, television). The district court, however, concluded that class certification was appropriate because the "geographic market definition" offered by Plaintiffs' expert—*i.e.*, the Philadelphia DMA—"is susceptible to proof at trial through available evidence common to the class." App., *infra*, 106a.

Comcast similarly adduced evidence that any deterrence effects on overbuilding would not have been shared on a class-wide basis, particularly since there was no evidence of actual or potential overbuilding in the majority of counties in the Philadelphia DMA. App., *infra*, 25a-26a. Indeed, the only alleged overbuilder—RCN Telecom Services—was licensed to

overbuild in only five of the eighteen counties in the Philadelphia DMA. *Id.* at 61a-62a & n.16, 82a-83a (Jordan, J., concurring in the judgment in part and dissenting in part). The district court again relied on Plaintiffs' expert to conclude that the "anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class." *Id.* at 144a.

Turning to damages, the district court noted that the model presented by Plaintiffs' expert had been prepared when they were advancing multiple theories of antitrust impact. App., *infra*, 186a. On those assumptions, Plaintiffs' expert had opined that damages could be established using a common model that compared actual cable prices to hypothetical prices that would have prevailed but for Comcast's challenged conduct. Once most of Plaintiffs' theories were rejected by the court, Comcast noted that this purported common model could not be used to establish damages, because (as Plaintiffs' expert conceded) the model did not provide a basis to segregate damages attributable solely to the remaining, accepted theory. *Id.* at 40a; *see also, e.g.*, C.A. J.A. 715-16. The district court nonetheless concluded that the now irrelevant model remained a "common methodology available to measure and quantify damages on a class-wide basis." App., *infra*, 187a.

The district court subsequently issued an amended order confirming its earlier findings that "the appropriate relevant geographic market can be the Philadelphia Designated Marketing Area ... and that this geographic market definition is susceptible to proof at trial through available evidence common to the class," that the "antitrust impact, if any, of Comcast's clustering through the challenged swaps

and acquisitions on overbuilder competition is capable of proof at trial through evidence that is common to the class," and that "the model and analyses" provided by Plaintiffs' expert "are common evidence available to measure and quantify damages on a class wide basis." App., *infra*, 190a-191a.

3. A divided panel of the Third Circuit affirmed on interlocutory appeal under Federal Rule of Civil Procedure 23(f). Relying on this Court's decision in *Eisen* and the Third Circuit's own pre-*Dukes* precedent, the majority consistently declined to address the arguments advanced by Comcast, claiming that it was "preclude[d]" from making "any further inquiry" into the merits beyond determining that Plaintiffs "*could* prove [their claims] through common evidence at trial." App., *infra*, 28a, 33a.

a. Although the Third Circuit majority noted the parties' dispute about the "relevant geographic market," it dismissed that dispute as raising "merits arguments" that were not "properly before [the court]." App., *infra*, 19a. Rather, the court believed that the critical issue is whether "the class could establish through common proof that that the relevant geographic market could be the Philadelphia DMA." *Ibid.*

The same was true for Comcast's evidence that any deterrence effects on overbuilding would not be felt on a class-wide basis. Characterizing the issue as "whether Plaintiffs actually have proven antitrust impact," the Third Circuit declined to resolve this "evidentiary" dispute. App., *infra*, 28a. The court instead thought it sufficient that "Comcast's alleged clustering conduct indeed *could have* reduced competition, raised barriers to market entry by an overbuilder, and resulted in higher cable prices to all of

its subscribers in the Philadelphia [DMA]." *Id.* at 29a (emphasis added).

Finally, while the Third Circuit acknowledged that, "[t]o satisfy ... the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof" (App., *infra*, 34a) it nonetheless insisted that "[w]e have not reached the stage of determining on the merits whether the methodology [offered by Plaintiffs] is a just and reasonable inference or speculative." *Id.* at 47a. Comcast's "attacks on the merits of the methodology," the court concluded, "have no place in the class certification inquiry." *Id.* at 48a.

b. Judge Jordan would have vacated the class certification order. App., *infra*, 53a (Jordan, J., concurring in the judgment in part and dissenting in part). Although he "agree[d] with the Majority's conclusion, though not its reasoning, with respect to the question of antitrust impact," he "conclude[d] that damages cannot be proven using evidence common to th[e] entire class." *Ibid.*

On antitrust impact, Judge Jordan disagreed with the majority that it could avoid "defining the relevant geographic market" on the theory that "the task [would] tak[e] [the court] into the merits." App., *infra*, 60a. Instead, he believed that the critical issue was "whether there is some class, in this case defined geographically, that can be shown, through common evidence, to have experienced elevated prices as a result of reduced overbuilding because of Comcast's clustering." *Ibid.* Judge Jordan acknowledged a "compelling argument" that such a class would not include the entirety of the Philadelphia DMA, and expressed some "skepticism" at Plaintiffs'

theory, but he nonetheless concluded that "it was not an abuse of discretion for the District Court to hold that Plaintiffs could show, by common evidence, the antitrust impact of clustering through the Philadelphia DMA." *Id.* at 61a, 63a.

Judge Jordan "part[ed] ways with the Majority entirely, however, when it [came] to class-wide proof of damages." App., *infra*, 65a. "[B]ecause the only surviving theory of antitrust impact is that clustering reduces overbuilding," he noted, the model used by Plaintiffs' expert could establish class-wide proof of damages only by "reflect[ing] the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding." *Id.* at 69a. The expert "formulated his model at a time when Plaintiffs had four separate theories of antitrust impact," however, and thus he did not "isolate the impact of reduced overbuilding." *Id.* at 69a-70a. For this reason, "not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show ... that damages can be proven using any evidence whatsoever—common or otherwise." *Id.* at 73a.

Yet even if Plaintiffs' expert were to refine his model, Judge Jordan noted, "there remains an intractable problem with any model purporting to calculate damages for all class members collectively." App., *infra*, 81a. The Philadelphia DMA includes 649 franchise areas, and the "major factors identified as influencing price ... vary widely within the franchise areas across the DMA," particularly since "Comcast prices its cable service at the franchise level." *Id.* at 85a. "[N]o model can calculate class-wide damages," therefore, "because any damages—such as

they may be—are not distributed on anything like a similar basis throughout the DMA." *Id.* at 86a.

REASONS FOR GRANTING THE PETITION

The district court below certified a class estimated by Plaintiffs to include more than two million current and former cable subscribers in the Philadelphia area—larger even than the class invalidated in *Wal-Mart Stores, Inc.* v. *Dukes*, which this Court regarded as "one of the most expansive class actions ever." 131 S. Ct. 2541, 2547 (2011). Although Comcast identified several respects in which individual issues of antitrust impact and damages would overwhelm any purportedly common issues, thus foreclosing certification under Rule 23(b)(3), the Third Circuit majority affirmed the certification order after concluding that it was foreclosed from considering those issues "at this stage of the litigation." App., *infra*, 32a.

The Third Circuit reached this conclusion based on its view that, under *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), any arguments that could be characterized as addressing the "merits" of Plaintiffs' claims were "not properly before" the court. App., *infra*, 19a. But this reading of *Eisen* was squarely rejected in *Dukes*, which held that district courts *must* resolve any "merits question[s]" that bear on the "propriety of certification under Rules 23(a) and (b)." 131 S. Ct. at 2552 n.6. Under *Dukes*, the district court was required to engage in a "'rigorous analysis'" to determine whether Plaintiffs had "*in fact*" satisfied the prerequisites for class certification (*id.* at 2551 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982)))—not, as the Third Circuit viewed the relevant inquiry, whether they "*could* prove [their claims] through common evidence at trial." App., *infra*, 28a.

The Third Circuit's reliance on *Eisen* is flatly inconsistent with *Dukes* and warrants summary reversal. In the alternative, plenary review is warranted because the Third Circuit's decision brings it into conflict with the Eighth and Ninth Circuits on the permissible scope of a district court's inquiry into "merits" issues at the class certification stage. Unlike the decision below, the Eighth and Ninth Circuits have recognized that *Dukes* requires—and *Eisen* does not limit—inquiry into the merits of the plaintiff's claims that bear on certification. Whether in the form of summary reversal or plenary review, this Court's review is warranted.

I. THE THIRD CIRCUIT'S LIMITATIONS ON REVIEW OF "MERITS" ISSUES AT THE CLASS CERTIFICATION STAGE ARE INCONSISTENT WITH THIS COURT'S PRECEDENTS AND CREATE A CIRCUIT SPLIT

Declaring that *Dukes* "neither guide[d] nor govern[ed] the dispute before [it]," the Third Circuit affirmed a class certification order while expressly refusing to resolve several "merits arguments" that bear on the propriety of certification. App., *infra*, 19a, 41a n.12. This decision cannot be reconciled with *Dukes* and conflicts with post-*Dukes* decisions from the Eighth and Ninth Circuits.

A. To obtain class certification under Rule 23, the plaintiff must satisfy each of the four prerequisites of Rule 23(a) and also demonstrate that the case fits into one of the permissible categories of class actions listed in Rule 23(b). As relevant here, Rule 23(a)(2) permits certification only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). If this commonality requirement and the others in Rule 23(a) are satisfied, then the

plaintiff may seek certification under Rule 23(b)(3) by proving (among other things) that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

1. This Court emphasized in *Dukes* that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove" that Rule 23's requirements are "*in fact*" satisfied. *Ibid.* The district court must make findings that the proponent of class certification has (or has not) carried this burden, which requires the court to engage in a "'rigorous analysis'" that "[f]requently ... will entail some overlap with the merits of the plaintiff's underlying claim." *Ibid.* (quoting *Falcon*, 457 U.S. at 161).

This Court emphasized the "necessity of touching aspects of the merits in order to resolve [the] preliminary matte[r]" of class certification (*Dukes*, 131 S. Ct. at 2552) specifically to dispel confusion that had arisen in the lower courts following *Eisen*. In *Eisen*, the Court held that a district court could not examine the merits of the lawsuit in deciding whether to shift the cost of notice to the class. 417 U.S. at 177-78. In dictum, however, the Court remarked: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be *maintained* as a class action." *Id.* at 177 (emphasis added).

Most courts of appeals recognized that, notwithstanding *Eisen*, district courts were required by *Falcon* to resolve any factual inquiries bearing on class

certification, regardless of whether they overlapped with the merits. *See, e.g.*, *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001). But *Eisen*'s dictum nonetheless "led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits," and "led other courts to think that a judge may not do so at least with respect to a prerequisite of Rule 23 that overlaps with an aspect of the merits of the case." *In re IPO Sec. Litig.*, 471 F.3d 24, 34 (2d Cir. 2006).

Dukes clarified that these expansive readings of *Eisen* were "mistake[n]." 131 S. Ct. at 2552 n.6. "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any ... pretrial purpose" *other than* shifting the cost of notice, this Court explained, "it is the purest dictum and is contradicted by our other cases." *Ibid.* In particular, the Court emphasized, *Eisen* has no applicability in "determin[ing] the propriety of certification under Rules 23(a) and (b)." *Ibid.* Instead, the district court must consider and resolve any "merits question" that bears on class certification, even if the plaintiff "will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." *Ibid.*

2. *Dukes* applied this approach to the commonality inquiry under Rule 23(a)(2). The plaintiffs there sought to proceed on behalf of a nationwide class of female Wal-Mart employees, arguing that the class had been subjected to discrimination for a common reason: Wal-Mart allegedly "'operated under a general policy of discrimination.'" *Dukes*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15). In support of this claim, the plaintiffs offered statistical evidence of discriminatory impact, as well as anecdotal

evidence of allegedly discriminatory pay and promotion decisions. Yet even though "proof of commonality necessarily overlap[ped] with [the plaintiffs'] merits contention that Wal-Mart engage[d] in a pattern or practice of discrimination," this Court analyzed the plaintiffs' evidence of company-wide discrimination to determine whether it was "convincing." *Id.* at 2552, 2556 (emphasis omitted).

The Court rejected the plaintiffs' statistical evidence, concluding that "regional and national" sex-based disparities were insufficient to establish "uniform, store-by-store disparity" and proved nothing about the "criteria" used by individual managers in making employment decisions. *Dukes*, 131 S. Ct. at 2555-56. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity," the Court emphasized, "d[id] not suffice." *Id.* at 2556. The anecdotal evidence "suffer[ed] from the same defects," and also was too sparse to show that "the entire company 'operat[ed] under a general policy of discrimination.'" *Ibid.* (quoting *Falcon*, 457 U.S. at 159 n.15). Concluding that the plaintiffs had provided no "convincing proof" of a "companywide discriminatory pay and promotion policy," this Court held that they had "not established the existence of any common question." *Id.* at 2556-57.

B. The Third Circuit's decision in this case cannot be reconciled with *Dukes*. Citing *Eisen* more than a half-dozen times, the Third Circuit professed itself unable even to consider, much less to resolve, Comcast's challenges to the class certification order because those "merits arguments" were "not properly before" the court. App., *infra*, 19a. Instead, the court limited its inquiry to whether "Plaintiffs had demonstrated by a preponderance of the evidence

that they *could* prove [the relevant issues] through common evidence at trial." *Id.* at 28a.

1. According to the Third Circuit, the governing precedent in this case is not *Dukes* but instead the pre-*Dukes* decision in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008). "Nothing in *Hydrogen Peroxide* requires plaintiffs to *prove* their case at the class certification stage," the Third Circuit stated; "[t]o require more contravenes *Eisen*," which purportedly "still precludes any further inquiry" into the merits. App., *infra*, 33a. *Dukes*, however, laid to rest this reading of *Eisen*, holding that courts cannot decline to address the merits of the plaintiffs' claims when they bear on the "propriety of certification." 131 S. Ct. at 2552 n.6.

According to the Third Circuit, *Dukes* "neither guides nor governs the dispute" in this case. App., *infra*, 41a n.12. In its view, "[t]he factual and legal underpinnings of [*Dukes*]—which involved a massive discrimination class action and different sections of Rule 23—are clearly distinct from those of this case." *Ibid.* That is wrong.

The Third Circuit never explained why it is significant that *Dukes* arose in the discrimination context. This Court turned to the allegations "[i]n this case" (*Dukes*, 131 S. Ct. at 2552) only *after* clarifying the proper standards under Rule 23; its analysis was not limited to discrimination but instead interpreted Rule 23 generally. *See Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) ("Rule 23 provides a one-size-fits-all formula for deciding the class-action question"). And in rejecting *Eisen*'s dictum, this Court did not remotely suggest that the dictum would still apply outside the discrimination context; indeed, because *Eisen* had involved

alleged violations of the antitrust and securities laws, the Court could simply have distinguished the case on that basis if, as the Third Circuit believed, it had intended to preserve any portion of *Eisen*'s dictum.

Moreover, *Dukes* illustrated its holding by discussing the fraud-on-the-market presumption of reliance in "class action suits for *securities* fraud." 131 S. Ct. at 2552 n.6 (emphasis added). Reliance is an element of private actions for securities fraud, and the individual inquiries necessary to prove reliance would ordinarily defeat class certification. *See, e.g.*, *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 229-30 (1988). The fraud-on-the-market presumption, however, permits an inference of reliance for "*all* traders who purchase stock in an efficient capital market." *Dukes*, 131 S. Ct. at 2552 n.6 (emphasis added). But while the existence of an efficient market is therefore a critical issue for both certification and the merits, "the plaintiffs seeking 23(b)(3) certification must *prove* that their shares were traded on an efficient market," even though "they will surely have to prove [the issue] *again* at trial to make out their case on the merits." *Ibid.* (first emphasis added).

Nor is it significant that *Dukes* was decided under Rule 23(a)(2)'s commonality requirement. The relevant portion of the opinion—that *Eisen* does not foreclose an inquiry into "the propriety of certification *under Rules 23(a) and (b)*" (*Dukes*, 131 S. Ct. at 2552 n.6 (emphasis added))—applies equally to Rule 23(b)(3). That undoubtedly explains why this Court specifically invoked Rule 23(b)(3) in its fraud-on-the-market example. *See ibid.*

If anything, this case follows *a fortiori* from *Dukes*. This Court noted in *Dukes* that it had "con-

sider[ed] dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* '[e]ven a *single* [common] question.'" 131 S. Ct. at 2556 (last emphasis added; alterations in original). That distinction is significant here because, even where there are common issues, the district court must still determine whether individual issues predominate—that is, predominance "is a *more demanding* criterion than the commonality inquiry under Rule 23(a)." *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (Sotomayor, J.) (emphasis added); *see also, e.g.*, *Amchem Prods, Inc.* v. *Windsor*, 521 U.S. 591, 623-24 (1997) ("[e]ven if Rule 23(a)'s commonality requirement may be satisfied," "the predominance criterion is far more demanding"). Under the Third Circuit's opinion, however, courts cannot resolve "merits" issues bearing on this more demanding inquiry, even though—after *Dukes*—they undoubtedly may do so in addressing commonality. There is no support for this counterintuitive view.[3]

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[3] The Third Circuit claimed that its holding was consistent with the purportedly "unifor[m]" concern about "converting certification decisions into mini trials" that had been expressed before *Dukes* by "recent scholarship." App., *infra*, 34a n.10. The Third Circuit's characterization of the four cited articles as "scholarship" is curious; at least three of them were authored in whole or part by members of the plaintiffs' class-action bar. It is similarly strange to suggest that their views were "uniformly" shared: Other scholars specializing in class actions had praised, as a "welcome step forward," the broad consensus among lower-court decisions holding (consistent with the later opinion in *Dukes*) that *Eisen* does not preclude the "weighing of competing expert submissions." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97,

[Footnote continued on next page]

2. The Third Circuit's application of the predominance requirement further confirms its departure from *Dukes*. Throughout its opinion, the Third Circuit identified disputes among the parties over issues bearing on class certification, while insisting (contrary to *Dukes*) that any attempt to resolve those disputes would "miscontru[e] our role at this stage of the litigation." App., *infra*, 32a.

The Third Circuit acknowledged, for instance, that Plaintiffs' theory depended on their claim that the "relevant geographic market," for purposes of antitrust impact, was the Philadelphia DMA. App., *infra*, 18a-19a. Defining the "relevant geographic market" was thus an essential step in determining whether common issues predominate over individual ones: If, as Comcast maintained, the relevant geographic market is narrower than the class region—and particularly if the market could be defined only based on programming choices available to individual households in different franchise areas—then the question whether Comcast possessed market power in the relevant market could not be resolved on a class-wide basis, and individual inquiries into alleged market power would overwhelm any purportedly common ones.

[Footnote continued from previous page]
111, 113 (2009); *see also, e.g.*, Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 Geo. Wash. L. Rev. 324, 372 (2011) ("the recent shift toward merits scrutiny at the class certification stage is a positive development"). The Court cited several of Professor Nagareda's works with approval in *Dukes* (131 S. Ct. at 2551, 2556-57), without reference to those selected by the Third Circuit; in any event, the Third Circuit was not at liberty to elevate the views expressed in "recent scholarship" above the holding of this Court in *Dukes*.

Thus, although any informed assessment of predominance necessarily would begin with market definition—and whether common proof existed of *any* market—the Third Circuit held that "[d]efining the relevant market ... is an issue of the merits." App., *infra*, 18a. "The inquiry before the District Court," it believed, was simply whether "the class *could* establish through common proof that the relevant geographic market *could* be the Philadelphia DMA." *Id.* at 19a (emphases added). It was therefore sufficient, according to the Third Circuit, that "when [the issue is ultimately] addressed on the merits, the class *may* be able to prove through common evidence that the relevant market is the Philadelphia DMA." *Id.* at 23a (emphasis added). Under *Dukes*, however, the court was plainly wrong to dismiss the parties' "dispute[s] [over] whether the District Court properly defined the relevant geographic market" as "merits arguments, which are not properly before [the court]." *Id.* at 19a.

Similarly, the Third Circuit declined to "reach into the record and determine whether Plaintiffs actually have proven antitrust impact" on a class-wide basis. App., *infra*, 28a. Comcast adduced considerable evidence that any alleged deterrence of overbuilder competition could not have established "higher cable prices for the entire class," and therefore that individual issues of antitrust impact would predominate. *Ibid.* The purported overbuilder, RCN, was not licensed to overbuild in thirteen of the eighteen counties in the Philadelphia DMA, and there is no reason to believe that overbuilding in only five counties would affect prices in the entire DMA, particularly since the evidence showed that Comcast could have offered discounts targeted to overbuilt counties (or, indeed, overbuilt franchise areas within

particular counties). *See id.* at 127a; *see also, e.g.*, C.A. J.A. 3923-25, 3336.

Yet the Third Circuit examined only whether Plaintiffs "*could* prove antitrust impact through common evidence at trial." App., *infra*, 28a. The Third Circuit thus deemed it sufficient that the "antitrust impact Plaintiffs allege is 'plausible in theory' and 'susceptible to proof at trial through available evidence common to the class.'" *Id.* at 30a (quoting *Hydrogen Peroxide*, 552 F.3d at 325).

With respect to damages, the Third Circuit again abdicated its responsibilities under Rule 23. Characterizing the issue as "whether Plaintiffs have provided a method to measure and quantify damages on a class-wide basis," the Third Circuit accepted Plaintiffs' "assur[ance]" that "damages are capable of measurement and will not require labyrinthine individual calculations." App., *infra*, 46a-47a. And this "assur[ance]" was provided only by a "multiple regression analysis" conducted by Plaintiffs' expert, on the basis of theories that were almost entirely rejected below, "to compare actual prices in the Philadelphia DMA to the estimated 'but-for' prices." *Id.* at 37a.

Plaintiffs' expert made *no* effort to determine whether his analysis would permit calculation of class-wide damages when limited to the only remaining theory—deterrence of overbuilding. Thus, as Judge Jordan noted, Plaintiffs' expert "fail[ed] to identify the 'but for' conditions that are relevant to what is now the only impact of Comcast's allegedly anticompetitive conduct." App., *infra*, 71a (Jordan, J., concurring in the judgment in part and dissenting in part). Indeed, Comcast presented evidence, which Judge Jordan credited, that "there remains an in-

tractable problem with any model purporting to calculate damages for all class members collectively"—namely, that those damages could vary widely for the "649 unique franchise areas in the Philadelphia DMA." *Id.* at 81a-82a & n.30.

This sort of individual variance was sufficient to defeat certification in *Dukes*, but the Third Circuit simply dismissed "Comcast's arguments [as] attacks on the merits of the methodology that have no place in the class certification inquiry." App., *infra*, 48a. "We have not reached the stage of determining on the merits," the court insisted, "whether the methodology is a just and reasonable inference or speculative." *Id.* at 47a.

C. The Third Circuit's continued reliance on *Eisen* to circumscribe the scope of its "merits" inquiry at the class certification stage further brings it into conflict with the Eighth and Ninth Circuits, which have concluded after *Dukes* that district courts may—indeed, must—resolve any merits disputes bearing on the certification inquiry.

1. In *Ellis* v. *Costco Wholesale Corp.*, the district court certified a nationwide class of current and former Costco employees who had allegedly been subject to gender discrimination in promotion decisions. 657 F.3d 970, 977-78 (9th Cir. 2011). The plaintiffs sought to establish commonality under Rule 23(a) by relying on expert evidence of disparities in managerial promotions and positions, which they believed showed a "common pattern and practice" that "affect[ed] the class as a whole." *Id.* at 982-83 (emphasis omitted). Costco, in turn, adduced evidence that any disparities were present only in two regions and therefore could not establish that the "entire class was subject to the same allegedly discriminatory

practice." *Id.* at 983. The district court, however, declined to "examin[e] the merits to decide this issue." *Id.* at 984.

Relying on *Eisen*, the district court asserted that "the merits of the class members' substantive claims were generally irrelevant to its inquiry." 657 F.3d at 981. Thus, like the Third Circuit in this case, the district court concluded that it "should not inquire into the merits of the suit during the certification process." *Ibid.*

The Ninth Circuit vacated and remanded in light of *Dukes*, and it took "this opportunity to clarify the correct standard" for the district court on remand. 657 F.3d at 981. The Ninth Circuit emphasized that "the merits of the class members' substantive claims are often highly relevant when determining whether to certify a class." *Ibid.* For that reason, not only "*may* [a district court] consider the merits to the extent that they overlap with class certification issues," "a district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Ibid.*

The decision below runs directly contrary to this reasoning. The Ninth Circuit held that the district court was required to decide "[w]hether gender disparities are confined to only two regions of Costco's eight regions" because that inquiry "addresses precisely the question of whether there are common questions of law and fact among the putative class members," even though it *also* bears on the merits of the plaintiffs' claims. 657 F.3d at 983; *see also id.* at 983-94 ("If no such *nationwide* discrimination exists, Plaintiffs would face an exceedingly difficult challenge in proving that there are questions of fact and law common to the *nationwide* class"). Yet the Third Circuit believed it sufficient that Plaintiffs "*could*

prove antitrust impact through common evidence," or "have provided a method to measure and quantify damages on a class-wide basis," without any effort to decide whether the broad geographical area claimed by Plaintiffs was the correct market, whether the overbuilding theory affected that area uniformly, or whether the damages theory offered by Plaintiffs' expert could appropriately be used to prove damages on a class-wide basis. App., *infra*, 28a, 47a.

2. The Third Circuit's decision similarly cannot be reconciled with the Eighth Circuit's opinion in *Bennett* v. *Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011). Relying on *Dukes*, the Eighth Circuit emphasized that the "'rigorous analysis'" required by Rule 23 "'[f]requently ... will entail some overlap with the merits of the plaintiff's underlying claim.'" *Id.* at 814 (quoting 131 S. Ct. at 2551). For that reason, "the district court may 'resolve disputes going to the factual setting of the case' if necessary to the class certification analysis." *Ibid.* (quoting *Blades* v. *Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)).

Applying this framework, the Eighth Circuit affirmed a district court's decision to deny certification of a class of employees alleging discrimination at a manufacturing plant because, the district court found, "employment practices varied substantially across the plant's various production departments." 656 F.3d at 814. The plaintiffs sought to challenge the district court's decision by invoking "statistical and anecdotal evidence" of discrimination. *Id.* at 815. But, the Eighth Circuit noted, this evidence was "insufficient to demonstrate that any disparate treatment or disparate impact present in one department was also common to all the others" given "strong evidence that employment practices varied

significantly from department to department." *Id.* at 815-16.

The Eighth Circuit's focus on whether the evidence before the district court was "insufficient to demonstrate" a particular finding bearing on class certification asks the court to engage in precisely the sort of "merits" inquiry that the Third Circuit believed was "not properly before [it]." App., *infra*, 19a. The Third Circuit's decision cannot be squared with *Bennett*.

* * *

The Third Circuit's attempt to reanimate the discredited dictum in *Eisen* just months after it was killed and buried by this Court is erroneous and warrants summary reversal. At minimum, this Court should grant review to resolve the conflict between the Third Circuit and the Eighth and Ninth Circuits over the extent to which district courts may address the merits of a plaintiff's claims in determining whether class certification is appropriate.

II. THE QUESTION PRESENTED IS IMPORTANT AND FREQUENTLY RECURRING

As this Court recognized in *Dukes*, the class certification inquiry under Rule 23 "[*f*]*requently* ... will entail some overlap with the merits of the plaintiff's underlying claim." 131 S. Ct. at 2551 (emphasis added). Particularly given the importance of the certification decision to class litigation, as well as the number and size of class actions pending across the country, this Court's review is warranted to address the proper scope of a district court's inquiry in these oft-arising circumstances.

A. "A district court's ruling on the certification issue is often the most significant decision rendered in ... class-action proceedings." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). That is so for obvious reasons: Given the potential damages at issue, "class certification creates insurmountable pressure on defendants to settle," regardless of the merits, "whereas individual trials would not." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, at 15 tbl. 5 (Cornell Law Faculty Working Papers, Paper No. 64, 2009) (average settlement over $100 million in certified class actions). As the district court acknowledged below, class certification is thus "'often the defining moment in class actions (for it may sound the death knell of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).'" App., *infra*, 92a-93a (quoting *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009)) (internal quotation marks omitted).

The importance of class certification is particularly pronounced in antitrust litigation. "Because of the complexity of the issues and the breadth of the discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.'" 6 James Wm. Moore *et al.*, *Moore's Federal Practice* § 26.46[1] (3d ed. 2011). "The risks associated with antitrust class actions" therefore "dictate that most cases will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Competition by Narrowing*

Noerr: *A Reply*, 18 Antitrust 77, 78 (2003); *see also* Eisenberg & Miller, *supra*, at 15 tbl. 5 (average settlement over $160 million in certified antitrust class actions).

The certification inquiry, in turn, will frequently overlap with the merits of the plaintiff's claims, as in this case. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1254, 1257 & n.12 (2002) (collecting cases where inquiry into the merits was determinative); Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 368 (1996) (same). Given the thousands of class actions filed in the federal courts every year (Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* app. B (2008)), it is hardly surprising that three courts of appeals have already squarely addressed the proper scope of "merits" inquiries in the aftermath of *Dukes*.

In this respect, "the problems in the Majority's reasoning" below are certain to "have practical repercussions far beyond this case." App., *infra*, 53a n.2 (Jordan, J., concurring in the judgment in part and dissenting in part). The Third Circuit handles a disproportionate percentage of antitrust class litigation: More than one-quarter of antitrust class actions settled in the federal courts between 1993 and 2008 were litigated there, and "the Eastern District of Pennsylvania is the leader in Antitrust" class actions. Eisenberg & Miller, *supra*, at 11. The decision below will therefore have far-reaching implications for antitrust litigation, and resolution of the proper scope of "merits" inquiry at the certification stage

will have even broader implications for class litigation generally.[4]

B. Not only does this case present the Court with an opportunity to resolve an issue of great significance to class litigation, it would further allow the Court to continue its longstanding practice of ensuring that lower courts apply procedural rules, including Rule 23, with appropriate rigor.

In *Bell Atlantic Corp.* v. *Twombly*, for example, this Court emphasized that a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief,'" under Rule 8(a)(2), "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. 544, 555 (2007) (alteration in original). The Court therefore rejected its earlier suggestion that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which

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[4] The decision below will also have significant consequences for this case. Plaintiffs' "conservative estimat[e]" of damages in the Philadelphia market alone exceeds $875 million (App., *infra*, 37a) and could (on Plaintiffs' calculation) exceed $1 billion—*before* trebling. *See* C.A. J.A. 3418; *see also* 15 U.S.C. § 15(a) (permitting treble damages). In addition, the Third Circuit's decision "will become a template for resolving similar class certification questions pending in cases involving the Chicago and Boston media markets." App., *infra*, 53a n.2 (Jordan, J., concurring in the judgment in part and dissenting in part). And because clustering is commonplace in the cable industry, "in all likelihood [the Third Circuit's decision] will be cited in other lawsuits against cable television service providers." *Ibid.* Thus, the "enormous potential liability" in this and similar cases is an additional "strong factor" favoring this Court's review. *Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in the denial of certiorari).

would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added). On a "literal reading," this Court noted, *Conley*'s inquiry would allow a "wholly conclusory statement of claim" to "survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561. But "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1950 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

Similarly, in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, this Court "again consider[ed] the standard district courts must apply when deciding whether to grant summary judgment" under Rule 56. 475 U.S. 574, 576 (1986). The Court emphasized that, under Rule 56, "the [disputed] issue of fact must be 'genuine,'" which means that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586.

In these cases, the Court insisted on faithful application of procedural rules even where doing so would require additional effort by district courts in assessing whether a pleaded cause of action is "plausible" or whether a disputed factual issue is "genuine." The same reasoning motivated this Court's rejection of *Eisen*'s dicta in *Dukes*: Although it undoubtedly imposes burdens on district courts to examine the merits to see whether the "party seeking class certification" has "affirmatively demonstrate[d] his compliance" with Rule 23, that examination is

required because "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. As the Seventh Circuit noted even before *Dukes*, Rule 23 means that "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives," to determine whether certification is appropriate. *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). This Court's review is warranted in this case—as in *Twombly*, *Iqbal*, *Matsushita*, and *Dukes*—to ensure that the lower federal courts engage in the inquiries required by procedural rules and this Court's decisions, notwithstanding the purported "concern[s]" of "recent scholarship." App., *infra*, 34a n.10; *see also supra* at 18 n.3.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 11, 2012

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-2865

CAROLINE BEHREND; STANFORD GLABERSON;
JOAN EVANCHUK-KIND; ERIC BRISLAWN

v.

COMCAST CORPORATION; COMCAST
HOLDINGS CORPORATION; COMCAST CABLE
COMMUNICATIONS, INC.; COMCAST CABLE
COMMUNICATIONS HOLDINGS, INC.;
COMCAST CABLE HOLDINGS, LLC,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-03-cv-06604)
District Judge: Honorable John R. Padova

Argued on January 11, 2011

Before: FISHER, JORDAN and *ALDISERT, Circuit Judges.

(Filed: August 23, 2011)

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OPINION OF THE COURT

ALDISERT, Circuit Judge.

In 2008 this Court handed down the seminal case of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 505 (3d Cir. 2008), which outlines the standards a district court should apply in deciding whether to certify a class. This appeal by Comcast requires us to decide if the District Court for the Eastern District of Pennsylvania properly satisfied *Hydrogen*'s directions in determining that questions of f or law common to class members predominate sufficiently to satisfy Rule 23(b)(3) of the Federal Rules of Civil Procedure. Appellants contend that the District Court exceeded a proper exercise of discretion and that its findings of fact were clearly erroneous. For the reasons that follow, we hold that the Court did not exceed its permissible discretion in determining that Plaintiffs established by a preponderance of evidence that they would be able to prove through common evidence (1) class-wide antitrust impact

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* Subsequent to oral argument, Judge Aldisert replaced Judge Ambro on the panel. The case was not reargued because the replacement Judge exercised his right to decide the case on the basis of the brief, the record and a transcript of the original oral argument.

(higher cost on non-basic cable programming), and (2) a common methodology to quantify damages on a class-wide basis. Accordingly, we will affirm.

I.

A.

> "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."
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> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

Beginning in 1998, Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") engaged in a series of transactions that increased Comcast's share of the multichannel video programming distribution services offered in the Philadelphia Designated Market Area ("Philadelphia DMA").[1] Comcast contracted with competing cable providers to either acquire them or to "swap" cable systems it owned in areas outside the Philadelphia DMA for cable systems within the Philadelphia DMA. These transactions form the "Cable System Transactions," involving the

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[1] "A DMA is a specific media research area that is used by Nielsen Media Research to identify television stations whose broadcast signals reach a specific area and attract the most viewers. DMA boundaries are widely accepted and used by all types of companies to target and keep track of advertising." *Steak n Shake Co. v. Burger King Corp.*, 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004).

"Transaction parties."[2] As a result of the Cable System Transactions, Comcast's share of subscribers in

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[2] The District Court set forth the Cable System Transactions:

- The April 1998 acquisition of Marcus Cable and its 27,000 cable subscribers located in Harrington, Delaware, which is part of the Philadelphia DMA.
- The June 1999 acquisition of Greater Philadelphia Cablevision, Inc., a subsidiary of Greater Media, Inc., and its 79,000 cable subscribers located in Philadelphia.
- The January 2000 acquisition of Lenfest Communications, Inc. and more than 1.1 million cable subscribers located in Berks, Bucks, Chester, Delaware, and Montgomery counties in Pennsylvania, and New Castle County in Delaware.
- The January 2000 acquisition of Lenfest's ownership interests in Garden State Cablevision L.P. and its 212,000 customers located in Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, and Salem counties in New Jersey, which is part of the Philadelphia DMA.
- The December 2000 swap agreement with AT & T, wherein Comcast obtained cable systems and approximately 770,000 subscribers, including subscribers located in Eastern Pennsylvania (Berks and Bucks counties) and New Jersey. In exchange, AT & T obtained cable systems and approximately 700,000 Comcast subscribers located in Chicago and elsewhere around the country.
- The January 2001 swap agreement with Adelphia Communications Corp., wherein Comcast obtained cable systems and approximately 464,000 subscribers located primarily in the Philadelphia area and adjacent New Jersey areas. In exchange, Adelphia received Comcast's cable systems and subscribers located in Palm Beach, Florida and Los Angeles, California.
- The April 2001 swap agreement with AT & T, wherein Comcast obtained cable systems and approximately 595,000 subscribers, including subscribers located in Pennsylvania and New Jersey.

[Footnote continued on next page]

the Philadelphia DMA allegedly increased from 23.9 percent in 1998 to 77.8 percent by 2002, settling at 69.5 percent in 2007. *See Behrend v. Comcast Corp.*, 264 F.R.D. 150, 160 (E.D. Pa. 2010) (setting forth Plaintiffs' expert's calculations as to Comcast's market share).

Plaintiffs, six non-basic cable television programming services customers of Comcast, brought a class action antitrust suit against Comcast in 2003. They alleged violations of section 1 of the Sherman Act, 15 U.S.C. § 1, for "imposing horizontal territory, market and customer allocations by conspiring with and entering into and implementing unlawful swap agreements, arrangements or devices," and section 2 of the Sherman Act, 15 U.S.C. § 2, on theories of monopolization and attempted monopolization.[3] App. 00232-243 (Third Am. Compl.). The Complaint

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[Footnote continued from previous page]

- The August 2006 swap agreement with Time Warner in connection with the Adelphia bankruptcy, wherein Comcast obtained cable systems and approximately 41,000 subscribers in the Philadelphia DMA.
- The August 2007 acquisition of Patriot Media and its 81,000 cable subscribers located in New Jersey, within the Philadelphia DMA.

Behrend v. Comcast Corp., 264 F.R.D. 150, 156 n.8 (E.D. Pa. 2010).

[3] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Section 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.* § 2.

alleged anticompetitive conduct in the Philadelphia area and the Chicago area. As only the alleged conduct in Philadelphia is before us, we focus on the nature of the class and the allegations in Philadelphia.

The proposed class included: "All cable television customers who subscribe or subscribed at any time since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster." App. 00217; *see id.* (excluding from the class "governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court"). The Philadelphia cluster is composed "of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey." *See Behrend*, 264 F.R.D. at 191.[4]

The Complaint alleged that Comcast had perpetrated an anticompetitive "clustering scheme." To clarify its contentions we pause to define two key terms. "Clustering" refers to a "strategy whereby cable [Multi-System Operators ("MSOs")] concentrate their operations in regional geographic areas by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This

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[4] The "Philadelphia cluster" and the "Philadelphia DMA" are separate terms. The Philadelphia DMA includes the cluster counties as well as the counties of Lehigh and Northampton, Pennsylvania. *See* App. 03614, 03795.

strategy is accomplished through purchases and sales of cable systems, or by system 'swapping' among MSOs." *Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 22 F.C.C. Rcd. 17791, 17810 n.134 (2007) (citation omitted). An "overbuilder" is a company that builds and offers customers a competitive alternative where a telecommunications company already operates. According to the Complaint, Comcast eliminated competition by (1) acquiring competitors in the Philadelphia market and (2) swapping with competitors cable systems and subscribers outside of the Philadelphia market for cable systems and subscribers within the Philadelphia market. The Complaint also alleged that Comcast engaged in conduct intended to exclude competition from overbuilder RCN Telecom Services, Inc. ("RCN"), by denying it access to "Comcast Sportsnet," requiring contractors to enter non-compete agreements, and inducing potential customers to sign up for long contracts with special discounts and penalty provisions in the areas where RCN intended to overbuild. App. 00235-239.

As a result of its clustering, Comcast allegedly harmed the class by eliminating competition, raising entry barriers to potential competition, maintaining increased prices for cable services at supra-competitive levels, and depriving subscribers of the lower prices that would result from effective competition. App. 00241-242. In other words, Comcast subscribers allegedly pay too much for their non-basic video programming cable service.

B.

On May 3, 2007, after extensive motions practice, *see* App. 00148-172 (listing 194 docket entries prior to certification), the District Court certified the pro-

posed class. App. 00354. It determined that Plaintiffs had met the requirements of Rule 23(a) of the Federal Rules of Civil Procedure (numerosity, commonality, typicality, and adequacy). App. 00366-372. It held also that Plaintiffs had met the predominance and superiority requirements of Rule 23(b). App. 00373-387. We denied on June 29, 2007, Comcast's 23(f) petition seeking interlocutory review.

The Court also certified the Chicago class's claims, but stayed them pending the outcome of the Philadelphia class. App. 00177, 00179.[5]

Following our decision in *Hydrogen Peroxide*, 552 F.3d 305, the District Court granted in part Comcast's motion to reconsider its Philadelphia certification decision (the Court denied without prejudice consideration of the Chicago class certification, again pending the outcome in Philadelphia). App. 00437-439. It vacated only the portion of the certification decision that addressed Rule 23(b)'s predominance requirement. The Court scheduled a hearing on the issue of predominance as it related to (1) antitrust impact, and (2) methodology of damages.

The District Court held an evidentiary hearing on October 13-15 and 26, 2009. During the four-day hearing, the Court heard live testimony from fact and expert witnesses, considered 32 expert reports, and examined deposition excerpts, as well as many other documents. Following the hearing, the Court issued to the parties a series of questions related to

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[5] Plaintiffs' counsel also filed a complaint in the District of Massachusetts on behalf of a "Boston cluster." That case was transferred to the Eastern District of Pennsylvania, and has been stayed pending resolution of the Chicago cluster claims. *See* App. 00179.

antitrust impact and damages methodology, and heard argument on November 16, 2009, to address its specific questions.

On January 7, 2010, the District Court recertified the Philadelphia class, and issued an amended class certification order on January 13, 2010. The Court reaffirmed and incorporated its May 2007 certification as to numerosity, commonality, typicality, and adequacy (Rule 23(a)), as well as superiority (Rule 23(b)(3)). App. 00029. On the disputed issue of predominance, the Court held that Plaintiffs had demonstrated by a preponderance of the evidence that: (1) questions of law and fact common to the members of the class predominated; (2) the relevant geographic market could be the Philadelphia Designated Market Area; (3) the class could establish antitrust impact on the theory that Comcast's clustering through the swaps and acquisitions deterred overbuilder competition; (4) the models and analyses of Plaintiffs' damages expert, Dr. James McClave, were common evidence available to measure and quantify damages on a class-wide basis; and (5) the class could establish antitrust impact through common evidence applicable to all class members. App. 00030. In certifying the class, however, the District Court narrowed the class's various theories of class-wide impact to a single theory:

> Proof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA.

App. 00032.

The Court accompanied its order with an 81-page memorandum opinion containing its analysis of the evidence presented at the evidentiary hearing. *Behrend v. Comcast Corp.*, 264 F.R.D. 150 (E.D. Pa. 2010). The Court summarized its opinion as follows:

> Having rigorously analyzed the expert reports, as well as the testimony presented by the parties during a four-day evidentiary hearing, we conclude that the class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis.

Id. at 154.

Comcast filed a Rule 23(f) petition to appeal on January 27, 2010. While that petition was pending, Comcast moved for summary judgment. The class responded, and Comcast filed a reply on June 4, 2010. We granted Comcast permission to appeal on June 9, 2010. The motion for summary judgment remains pending in the District Court.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. We have jurisdiction pursuant to 28 U.S.C. § 1292(e) and Rule 23(f) of the Federal Rules of Civil Procedure.

"We review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Hydrogen Peroxide*, 552 F.3d at 312 (ci-

tation and quotations omitted). We review de novo whether an incorrect legal standard has been used. *Id.* (citation omitted).

For a district court's finding of fact to be clearly erroneous, the standard is high. "Clearly erroneous" has been interpreted to mean that a reviewing court can upset a finding of fact, even if there is some evidence to support the finding, only if the court is "left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). This means that "[i]t is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972). Especially pertinent to the issue before us, the Supreme Court has explained:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where

> there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-574 (1985) (quotations and citations omitted); *accord PA Prison Soc'y v. Cortes*, 622 F.3d 215, 231 (3d Cir. 2010).

III.

Comcast raises three principal arguments on appeal, urging us to overturn the District Court's certification order on the grounds that: (1) the Court's finding that the class can establish class-wide antitrust impact through common evidence was incorrect for various reasons; (2) the District Court exceeded its discretion in accepting Plaintiffs' proposed methodology for damages calculation; and (3) the Court's certification of a per se antitrust claim was clear error. In response, Plaintiffs defend in all respects the District Court's certification decision. We first outline the Rule 23 legal framework and then analyze each of Comcast's contentions.

Rule 23 of the Federal Rules of Civil Procedure allows a class action if certain requirements are met. First, the class must meet the "prerequisites" of Rule 23(a): numerosity, commonality, typicality, and adequacy. Second, the class must fit one of the Rule 23(b) types of classes. Here, Plaintiffs seek certification under Rule 23(b)(3), which requires (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). These requirements are known as predominance and superiority.

The district court must conduct a "rigorous analysis" of the evidence and arguments in making the class certification decision. *Hydrogen Peroxide*, 552 F.3d at 318. The analysis requires "a thorough examination of the factual and legal allegations" and "may include a preliminary inquiry into the merits." *Id.* at 317 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166, 168 (3d Cir. 2001)). We explained in *Hydrogen Peroxide* the permissible extent of any inquiry into the merits:

> [T]he requirements set out in Rule 23 are not mere pleading rules. The court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied. . . . An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. Some uncertainty ensued when the Supreme Court declared in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Only a few years later, in addressing whether a party may bring an interlocutory appeal when a district court denies class certification, the Supreme Court pointed out that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" [*Coopers & Lybrand v.*] *Livesay*, 437 U.S. [463,] 469

> [(1978)] (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). As we explained in *Newton*, 259 F.3d at 166-69, *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement. Other courts of appeals have agreed.

552 F.3d at 316-317 (quotations and citations omitted).[6] Accordingly, at the class certification stage, we are precluded from addressing any merits inquiry unnecessary to making a Rule 23 determination. *Id.* Further, any findings for the purpose of class certification "do not bind the fact-finder on the merits." *Id.* at 318.

Plaintiffs bear the burden of establishing each element of Rule 23 by a preponderance of the evidence. *Id.* at 320 ("[T]o certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.") (citation omitted). The court must also examine critically expert testimony on both sides and may be persuaded by either side as to whether a certification requirement has been met. *Id.* at 323. Indeed, "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." *Id.*

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[6] The Supreme Court confirmed our interpretation of the Rule 23 inquiry in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See id.* at 2551, 2552 n.6 (stating that "[f]requently [the Rule 23] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim," but *Eisen* still prohibits "a merits inquiry for any other pretrial purpose")

The parties dispute whether Plaintiffs have met the predominance requirement. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). It "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws," *id.* at 625, but a court may not relax its certification analysis as to each element of Rule 23, *see Hydrogen Peroxide*, 552 F.3d at 322. To assess whether common or individual issues predominate, a district court must examine the nature of the evidence and "formulate some prediction as to how specific issues will play out . . . ." *Id.* at 311 (quotations and citations omitted).

Reviewing a district court's certification of a class, we examine the elements of the class's claims "through the prism" of Rule 23. *Id.* (quoting *Newton*, 259 F.3d at 181). The elements of the claims before us are (1) a violation of the antitrust laws (here, sections 1 and 2 of the Sherman Act), (2) individual injury resulting from that violation, and (3) measurable damages. *See id.* Individual injury, also known as antitrust impact, "is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." *Id.* At the class certification stage, Plaintiffs' burden is "to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* at 311-312.

IV.

Comcast devotes much of its energy to contending that the District Court exceeded its discretion in

holding that Plaintiffs had established common evidence of antitrust impact. It attacks this issue in two ways: first, that the District Court failed to apply the correct legal standard for determining the relevant geographic market, and, second, that the District Court made clearly erroneous factual findings by relying on Plaintiffs' expert for proof of class-wide antitrust impact. We address each contention in turn.

A.

Before the District Court, Plaintiffs contended that the relevant geographic market was the Philadelphia Designated Market Area, whereas Comcast countered that it was each individual's household. The District Court agreed with Plaintiffs. *Behrend*, 264 F.R.D. at 160. Plaintiffs' expert, Dr. Michael Williams, provided seven bases to support the conclusion that the relevant geographic market was the Philadelphia DMA. The District Court set forth each basis, as well as Comcast's counterarguments. 264 F.R.D. at 157-160. The Court stated that Comcast's focus on the individual household was not supported by the record, and that setting such a small market would be "impractical and inefficient." 264 F.R.D. at 160. Instead, the Court noted that the alleged conduct centered on Comcast's attempt to acquire substantially all of the cable systems in the Philadelphia DMA, and that the Federal Communications Commission aggregates relevant geographic markets in which customers face "similar competitive choices." 264 F.R.D. at 160. The Court concluded, "[T]he record evidence shows that consumers throughout the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from

Comcast's clustering conduct in the Philadelphia DMA." 264 F.R.D. at 160.

Comcast contends that the Court failed to articulate or apply the correct legal standard. According to Comcast, the geographic market is defined in terms of consumer demand substitutability—the area in which a buyer may look for the goods or services he seeks. Because an individual can choose only among providers offering video programming services to his household, Comcast asserts that the geographic market must be the household. Comcast contends additionally that the Court improperly credited Dr. Williams's seven bases for the geographic market because it later rejected three of the seven theories, and that the Court's two stated reasons for accepting the geographic market were irrelevant and erroneous.

Plaintiffs respond at three levels. First, they contend that they need not define the relevant geographic market: per se claims do not require defining the geographic market, and they offered direct evidence of market power, thereby relieving them of the obligation to define the relevant geographic market. Second, Plaintiffs state that the District Court used the commercial realities test to determine the relevant geographic market and did not ignore demand substitutability. Third, according to Plaintiffs, Comcast cannot demonstrate clear error in the Court's factual determination that "consumers throughout the [Philadelphia] DMA can face similar competitive choices." *See Behrend*, 264 F.R.D. at 160.

B.

We will affirm the District Court's conclusion that the Philadelphia DMA is a relevant geographic

market "susceptible to proof at trial through available evidence common to the class." 264 F.R.D. at 160.

The relevant geographic market is a component of substantive antitrust law. For antitrust claims analyzed through the rule of reason, plaintiffs must demonstrate that the defendant possessed market power in the relevant geographic market. *See Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984). For per se claims, plaintiffs need not establish a geographic market. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 316-317 (3d Cir. 2010) (explaining that some prohibited practices can be conclusively presumed to unreasonably restrain competition). Additionally, "direct proof of monopoly power does not require a definition of the relevant market." *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 n.3 (3d Cir. 2007).

Defining the relevant geographic market, however, is an issue of the merits. *See, e.g., Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307 (3d Cir. 1982) (addressing on appeal whether jury verdict should be set aside because of allegedly erroneous definition of relevant geographic market). At the class certification stage, a court need only be satisfied that issues—including the definition of a geographic market—will be capable of proof through evidence common to the class. *See Hydrogen Peroxide*, 552 F.3d at 311; IIA Phillip E. Areeda et al., *Antitrust Law* ¶ 398b (3d ed. 2007) (describing that at the class certification stage the plaintiffs' expert typically concludes that "any significant economic issues underlying the class representative's antitrust claims, including but not limited to *issues regarding market definition* . . . will be analyzed and proven

through the use of common data and evidence that would be used to prove the claims of the other members of the proposed Class") (emphasis added). If the plaintiffs allege per se claims, they may still need to persuade the district court that, in the event defining the relevant geographic market becomes necessary, it is capable of common proof. *See* Areeda et al., *supra*, ¶ 398b.

The inquiry before the District Court, therefore, was whether Plaintiffs could demonstrate by a preponderance of the evidence that they would be able to establish a relevant geographic market capable of proof common to the class. The District Court concluded it was: "We conclude that Dr. Williams' geographic market definition is susceptible to proof at trial through available evidence common to the class." 264 F.R.D. at 160. The parties dispute whether the District Court properly defined the relevant geographic market—Comcast contends it erred as a matter of law, and Plaintiffs respond they need not establish a geographic market. These are merits arguments, which are not properly before us. Our review is limited to whether the Court exceeded its discretion in determining that the class could establish through common proof that the relevant geographic market could be the Philadelphia DMA. We conclude it did not, legally or factually.

C.

First, we perceive no legal error in the District Court's reasoning. Procedurally, it conducted the required "rigorous analysis" by examining in depth the expert opinions on both sides and setting forth its conclusions. *See Hydrogen Peroxide*, 552 F.3d at 317, 320. Substantively, the Court determined that "the record evidence shows that consumers throughout

the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from Comcast's clustering conduct in the Philadelphia DMA." 264 F.R.D. at 160. Comcast contends that the Court failed to apply the consumer demand substitutability test, which defines the relevant geographic market as "that area in which a potential buyer may rationally look for the goods or services he seeks." *Gordon v. Lewiston Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005) (citing *Pa. Dental Ass'n*, 745 F.2d at 260). We determine otherwise: the Court's analysis of the relevant geographic market for purposes of class certification comported with our precedent.

"[I]dentification of the relevant geographic market is a matter of analyzing competition." *Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982). Defining it "is a question of fact to be determined in the context of each case in acknowledgment of the commercial realities of the industry being considered." *Gordon*, 423 F.3d at 212 (quoting *Borough of Lansdale*, 692 F.2d at 311). In these decisions of our Court, one of which has commanded our attention for almost thirty years, we relied on two Supreme Court cases to develop this standard: *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966), which held that the relevant geographic market under the Sherman Act was "not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they built and conduct their business," and *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 332 (1961), which defined the relevant geographic area for § 3 of the Clayton Act, 15 U.S.C. § 3, as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies" or as the area in which suppliers

"effectively compete." In another Clayton Act case, the Supreme Court stated: "The geographic market selected must, therefore, both correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-337 (1962) (quotations and citations omitted); *see Grinnell*, 384 U.S. at 572 (citing *Brown Shoe* as analogous to determining the relevant market for the Sherman Act).

D.

The District Court's determination—that consumers "face similar competitive choices" in the Philadelphia DMA as a result of Comcast's alleged clustering conduct—is consistent with the above standards because it considers both where a buyer may rationally look for goods and the commercial reality of the industry. Comcast's insistence that the geographic market must be the individual household (as the only place where a consumer can "comparison shop") ignores that the geographic market must be "economically significant," *Brown Shoe Co.*, 370 U.S. at 336-337, and may be premised on "the commercial realities of the industry being considered," *Borough of Lansdale*, 692 F.2d at 311, the area where suppliers "effectively compete," *Tampa Electric Co.*, 365 U.S. at 332, or the broader market reflecting the reality of conducting business, *Grinnell*, 384 U.S. at 576.[7] We therefore discern no legal error in the District Court's analysis.

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[7] We note additionally the tension between the concept of a "geographic market" and Comcast's conclusion that "the rele-

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E.

Second, we recognize ample evidence in the record supporting the District Court's factual findings underpinning its market determination, which precludes us from reversing those findings as clearly erroneous. *See, e.g.*, *EBC, Inc. v. Clark Bldg. Sys. Inc.*, 618 F.3d 253, 273 (3d Cir. 2010) ("We will not reverse '[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety' even if we would have weighed that evidence differently." (quoting *Anderson*, 470 U.S. at 573-574)). The Court cited Dr. Williams's seven bases for drawing the geographic market as the Philadelphia DMA. *Behrend*, 264 F.R.D. at 157-160. Although it rejected three of those bases, the remaining four tended to show that Comcast's clustering had anticompetitive effects in the Philadelphia DMA by deterring over-

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vant geographic market . . . is each class member's residence." Appellants' Br. 15. As of 2009, Philadelphia County alone had over 560,000 households. *See* U.S. Census Bureau, *Philadelphia County QuickFacts*, http://quickfacts.census.gov/qfd/states/42/42101.html. Nationwide, in 2010 there were over 117 million households. *See* U.S. Census Bureau, *America's Families and Living Arrangements: 2010*, http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (Table AVG1). Taken at face value, Comcast's assertion that there are millions of geographic markets in the Philadelphia DMA (or over one hundred million geographic markets nationwide for multichannel video programming distributors) renders the phrase "geographic market" nonsensical. Perhaps for this reason, our research revealed no case—nor does Comcast provide one-in which a geographic market has been set at the individual household level. *Cf. Brown Shoe*, 370 U.S. at 337 ("Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.").

builders from entering the Designated Market Area, and that the industry itself used DMAs to focus its competition. Additional evidence in the record, reviewed in detail below, demonstrated that clustering results in fewer competitors and higher cable prices for the entire market. This evidence belies Comcast's claim that there is no change at the individual level when Comcast aggregates surrounding franchises.

Simply put, the District Court determined by a preponderance of the evidence that, when addressed on the merits, the class may be able to prove through common evidence that the relevant geographic market is the Philadelphia DMA. This determination did not exceed the Court's permissible discretion. To the extent Comcast reads the Court's opinion as actually fixing the relevant geographic market, we note that its determination was made solely for the purposes of class certification and will not be binding on the merits. *See Hydrogen Peroxide*, 552 F.3d at 318.[8]

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[8] The Concurring and Dissenting Opinion ("Concurrence-Dissent") faults the parties, the District Court and this Opinion for using "equivocally" the phrase "relevant geographic market." Slip Concurring-Dissenting Op. at 8. Specifically, it asserts that this Opinion "assumes . . . that the class is properly defined to cover the Philadelphia DMA . . . ." *Id.* at 10. The Concurrence-Dissent misunderstands an important distinction: as noted *supra* footnote 4, Plaintiffs have alleged a "class region" (to borrow from the Concurrence-Dissent's terminology) of a "Philadelphia cluster," which is distinct from the contested relevant geographic market of the "Philadelphia DMA." Our "assumption" concerning the "class region" is an uncontested piece of Plaintiffs' case: Comcast appeals only the precise issue of whether the District Court applied a correct legal standard in determining that the substantive antitrust geographic market could be established by evidence common to the class, *not*

[Footnote continued on next page]

V.

Comcast hinges its next line of arguments on the District Court's final certification: "Proof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." App. 00032. According to Comcast, the District Court made clearly erroneous findings of fact by relying on Plaintiffs' expert, Dr. Williams, in support of the certified theory of antitrust impact.

The District Court considered in great detail the arguments presented by both sides. It rejected three of Plaintiffs' four theories of class-wide impact. *Behrend*, 264 F.R.D. at 166 (rejecting theory of direct broadcast satellite ("DBS") foreclosure); *id.* at 177-178 (rejecting benchmark theory); *id.* at 181 (rejecting bargaining power theory). Nonetheless, it accepted that Plaintiffs could establish class-wide antitrust impact on the theory of clustering and its im-

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[Footnote continued from previous page]
whether the "Philadelphia cluster" is an appropriate "class region." *See* Appellants' Br. at 15 (labeling the issue as: "The District Court Failed To Apply The Correct Legal Standard In Its Ruling On Plaintiffs' Geographic Market Definition"); *id.* at 20 (summarizing that "the alleged geographic market accepted by the district court is wholly divorced from the legal standard for determining the correct geographic market"). Accordingly, when the Concurrence-Dissent states, "A compelling argument *could be made* . . .," Slip Concurring-Dissenting Op. at 11 (emphasis added), it goes beyond our role as a reviewing court by raising and addressing an argument not before us. *See, e.g.*, *AT & T v. F.C.C.*, 582 F.3d 490, 495 (3d Cir. 2009) ("An appellant waives an argument in support of reversal if he does not raise that argument in his opening brief."), *rev'd on other grounds*, 131 S. Ct. 1177 (2011).

pact on overbuilder competition. After detailing the evidence put forth by both sides, *id.* at 166-174, the Court concluded that "the Class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class," *id.* at 174. The Court found that through the model of Plaintiffs' expert, Dr. Williams, and the empirical studies conducted by governmental agencies and private researchers, the class had shown that the presence of an overbuilder constrains cable prices, and that Comcast engaged in conduct designed to deter the entry of overbuilders in the Philadelphia DMA. *Id.* at 174. It found unpersuasive the conclusions of Comcast's expert, Dr. David J. Teece, that overbuilding is not a successful business model. *Id.* at 174-175.

A.

On appeal, Comcast constructs a four-tiered argument to support its objections. First, it contends that Plaintiffs cannot show class-wide antitrust impact based on potential overbuilding by any of the "Transaction parties."[9] According to Comcast, the evidence demonstrated there was no actual competition between the Transaction parties; Plaintiffs therefore must show that the challenged conduct eliminated potential competition. In Comcast's view, the record evidence reflects that no Transaction par-

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[9] As detailed *supra* note 2, the "Transaction parties" are the parties that Comcast acquired or with which it swapped cable systems, which include: Marcus Cable; Greater Philadelphia Cablevision, Inc.; Lenfest Communications, Inc.; AT&T; Adelphia Communications Corp.; Time Warner; and Patriot Media.

ties had taken any affirmative steps to overbuild and, consequently, there was no potential competition to eliminate. Second, Comcast contends that Plaintiffs identified only RCN Telecom Services, Inc., as attempting to overbuild in the Philadelphia DMA. The evidence establishes, according to Comcast, that RCN was not going to overbuild as a result of its own financial woes, not as a result of any alleged activity on the part of Comcast. Third, as the argument goes, because there was no record evidence demonstrating actual or potential competition, the theoretical opinions indicating otherwise rendered by Plaintiffs' expert, Dr. Williams, were clearly erroneous. Comcast disputes at many levels Dr. Williams's methodology and results in his "market structure" and "market performance" opinions. Summed up, Comcast contends that theoretical expert opinions are no replacement for market facts, the record evidence showed no actual or potential overbuilding (as addressed in the first two contentions), and therefore any reliance on the expert opinions for evidence of anticompetitive behavior was clearly erroneous. Fourth, Comcast adds that any evidence of anticompetitive conduct specific to Delaware County could not serve as evidence of class-wide impact for the Philadelphia cluster.

B.

Plaintiffs respond to each level of Comcast's position. First, citing many portions of the record, they assert that there is "overwhelming" record evidence that Comcast's clustering of the Philadelphia DMA deterred and reduced overbuilding competition, resulting in antitrust impact (higher cable prices) for all class members. According to the class, the record demonstrates: clustering deters overbuilding, the

swaps and acquisitions eliminated competition, Multi-System Operators ("MSOs") actually do overbuild one another, Comcast and other MSOs look to one another's prices to set their own, and the MSOs chose affirmatively not to compete. The class adds that Comcast is raising a merits argument by asking the Court to consider the "potential competition" doctrine. Second, Plaintiffs contend that Comcast raises a merits issue by asking the Court to examine whether Comcast's conduct in fact prevented RCN from overbuilding in more areas than it did. In any event, they state that the record evidence demonstrates RCN had the intent and capital to overbuild the Philadelphia market. Third, Plaintiffs state that Dr. Williams's theoretical model plainly shows common evidence of class-wide impact; Comcast's contention that Dr. Williams's opinions do not *prove* antitrust impact is one for the jury to decide on the merits. Fourth, the evidence related to Delaware County "adds to and illustrates" the common evidence of Comcast's anticompetitive clustering conduct.

VI.

We begin the analysis of these contentions by focusing on the precise inquiry:

> Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact *is capable of proof at trial* through evidence that is common to the class rather than individual to its members.

Hydrogen Peroxide, 552 F.3d at 311-312 (emphasis added). Many of Comcast's contentions ask us to reach into the record and determine whether Plaintiffs actually have proven antitrust impact. This we will not do. Instead, we inquire whether the District Court exceeded its discretion by finding that Plaintiffs had demonstrated by a preponderance of the evidence that they *could* prove antitrust impact through common evidence at trial.

This dispute therefore is evidentiary. When facts are at issue, the District Court exceeds its discretion in certifying a class only if its findings are clearly erroneous. *Id.* at 312. Comcast bears a heavy burden in convincing us that the District Court's factual findings were clearly erroneous. *See Anderson*, 470 U.S. at 573-574 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it . . . ."); *Krasnov*, 465 F.2d at 1302 ("It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.").

Comcast has not carried its burden. Plaintiffs provided evidence at the certification hearing that tended to show that Comcast's clustering (through swaps and acquisitions) reduced competition, deterred the entry of overbuilders, and resulted in higher cable prices for the entire class. This evidence displays "some hue of credibility" and bears a rational relationship to the Court's finding. *See Krasnov*, 465 F.2d at 1302.

For example, one of Plaintiffs' experts, Dr. Williams, concluded after a detailed analysis that, *inter alia*, Comcast's clustering increased its market share and, consequently, its market power, thereby raising barriers to entry for other multichannel video programming distributors and resulting in higher cable rates for all members of the class. App. 03599-3600; *see also Behrend*, 264 F.R.D. at 166-171 (providing in great detail the analyses, evidentiary support, and conclusions of Dr. Williams). Dr. Williams also cited to Federal Communications Commission reports, Government Accountability Office reports, and academic research, all of which indicated that reducing competition by clustering leads to higher cable rates. App. 03663-3668. Another expert, Dr. Hal Singer, used extensive record evidence to analyze how Comcast's clustering denied overbuilders access to the Philadelphia DMA. App. 03501-3529. Dr. Singer concluded that Comcast's actions allowed it to foreclose competitors and elevate prices. App. 03450. He also referenced multiple studies—both governmental and private, some of which overlapped with those referenced by Dr. Williams—that concluded that cable prices are lower when overbuilder competition is present. App. 03537-3548. Also in the record are specific instances of Multi-System Operators attempting to overbuild one another around the country. *See* Appellees' Br. 27 n.17 (citing 13 distinct examples in the record of MSOs overbuilding one another).

All of this evidence demonstrates that Comcast's alleged clustering conduct indeed could have reduced competition, raised barriers to market entry by an overbuilder, and resulted in higher cable prices to all of its subscribers in the Philadelphia Designated Market Area. Based on this evidence, we determine

that the antitrust impact Plaintiffs allege is "plausible in theory" and "susceptible to proof at trial through available evidence common to the class." *Hydrogen Peroxide*, 552 F.3d at 325; *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 158 (3d Cir. 2002) (holding that common issues predominated sufficient for class certification when plaintiffs allegedly "were all affected by the increased price" they paid for linerboard). We are satisfied that the District Court's findings were supported by the evidence and were not clearly erroneous.

Comcast protests that the record demonstrates that there was no actual or potential competition among the Transaction parties. In light of the above record evidence, however, Comcast's interpretation of the evidence does not render the District Court's findings clearly erroneous. Comcast remains free to make these arguments to the jury.

VII.

Comcast's other contentions are equally unpersuasive. There is conflicting evidence as to the role Comcast played in RCN Telecom Services, Inc.'s decision to not overbuild further in the Philadelphia DMA. Plaintiffs highlight record evidence that RCN had the intent and capital necessary to overbuild the Philadelphia market. Appellees' Br. 34-35. Comcast contends instead that RCN faced financial woes, as a result of which it abandoned its plans to overbuild. Appellants' Br. 24-28. The District Court credited Plaintiffs' explanation: "What Dr. Teece considers 'unlikely,' Dr. Singer considers to be the common evidence of antitrust impact, namely that RCN was stymied in its efforts by Comcast's predatory behavior." *Behrend*, 264 F.R.D. at 175. Again, we are satisfied that the District Court's finding was not clear-

ly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. Here there are two permissible views of the evidence and we will not disturb the District Court's finding.

Similarly, Comcast contends that Dr. Williams's analysis and methodology was flawed for various reasons, including the allegation that it was unsupported by any actual evidence. We disagree. As detailed above, there was ample evidence that clustering conduct can deter entry of overbuilders and result in higher cable prices. Dr. Williams and Dr. Singer examined evidence specific to Comcast's activities in the Philadelphia market, as well as numerous independent studies on the effects of cable clustering, to reach their conclusions. Comcast cites various cases for the proposition that "expert theory is not a substitute for market facts." *See, e.g.*, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (expert opinion rendered unreasonable by indisputable record facts); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 27 (1st Cir. 2008) (expert analysis unfinished and "purely conclusory"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999) ("An expert opinion based on . . . meager superficial information . . . is highly speculative, unreliable, and of dubious admissibility."). Although expressing a correct legal precept, those cases addressed situations in which the experts largely failed to tie their theories to any evidence; the precept therefore does not apply to this case in which the experts' theories were based on and correlated to other record evidence.

Comcast also asserts that every individual had one or two options from which to choose cable and that consequently only the name of the provider changed, not the number of options. This assertion completely overlooks the nature of the claims of the class: by clustering, Comcast was able to deter the entry of overbuilders, which resulted in higher prices for all non-basic Comcast subscribers. And Plaintiffs provided evidence that clustering can have this effect. In short, the District Court's task was to weigh expert testimony and make a determination, *Hydrogen Peroxide*, 552 F.3d at 323, and we discern no error in the Court's determination that Dr. Williams's analysis demonstrated that class-wide antitrust impact was susceptible to common proof.

As to Comcast's remaining contention that the District Court erred by crediting as evidence of class-wide impact the alleged conduct targeted at RCN Telecom Services, Inc., in Delaware County, we agree with the class that the alleged conduct is relevant to establishing class-wide impact. We have explained that "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc) (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Alleged specific conduct aimed at preventing the entry of an overbuilder anywhere in the Philadelphia DMA supports Plaintiffs' allegations of Comcast's ability to maintain supra-competitive prices for the entire market.

VIII.

At bottom, Comcast misconstrues our role at this stage of the litigation. Comcast would have us decide on the merits whether there was actual or po-

tential competition among the Transaction parties, the reason RCN Telecom Services, Inc., abandoned the Philadelphia market, and whether Plaintiffs' experts proved antitrust impact. We are not the jury. Although in *Hydrogen Peroxide* we heightened the inquiry a district court must perform on the issue of class certification, nothing in that opinion indicated that class certification hearings were to become actual trials in which factual disputes are to be resolved. Indeed, as we explained in *Hydrogen Peroxide*, a district court may inquire into the merits only insofar as it is "necessary" to determine whether a class certification requirement is met. 552 F.3d at 316. *Eisen* still precludes any further inquiry. *See Eisen*, 417 U.S. at 178 ("[T]he question is not whether the plaintiff or plaintiffs . . . will prevail on the merits, but rather whether the requirements of Rule 23 are met." (quoting Judge Wisdom's holding in *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971))); *Hydrogen Peroxide*, 552 F.3d at 317 ("*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement."). We allow *preliminary* merits inquiries when *necessary* for Rule 23 because of the potentially "decisive effect on litigation" of a certification decision, *Newton*, 259 F.3d at 167, but those inquiries remain limited and non-binding on the merits at trial, *Hydrogen Peroxide*, 552 F.3d at 318. Nothing in *Hydrogen Peroxide* requires plaintiffs to *prove* their case at the class certification stage; to the contrary, they must establish by a preponderance that their case is one that meets each requirement of Rule 23. To require more contravenes *Eisen* and runs dangerously close to stepping on the toes of the Seventh

Amendment by preempting the jury's factual findings with our own.[10]

In sum, we hold that the District Court's determination—that Plaintiffs have demonstrated by a preponderance of the evidence that they can establish class-wide antitrust impact through common evidence—did not exceed its discretion.

IX.

To satisfy another portion of the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof. *See Hydrogen Peroxide*, 552 F.3d at 311, 325-326; *cf. Newton v.*

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[10] Indeed, recent scholarship uniformly has expressed concern over the trend towards converting certification decisions into mini trials. *See* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 970 (2010) (contending that the "judicial tendency to impose requirements at class certification" serves no legitimate purpose and risks violating the Seventh Amendment); Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. Mich. J.L. Reform 323, 323 (2010) (stating that judicial resolution of merits at the certification stage precludes victims from obtaining redress, infringes on the Seventh Amendment, and serves no legitimate policy concerns); Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. Rev. 935, 940 (2009) (intensifying the Rule 23 analysis is inconsistent with the Rule itself and highly inefficient); J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions – Common Mistakes in Applying the Class Action Standard*, 41 Rutgers L.J. 163, 169 (2009) (contending, *inter alia*, that requiring the district court to determine by a preponderance whether plaintiffs' proposed proof is actually correct or incorrect would "substitute a court's own evaluation of key merits questions for that of the jury").

Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 187 (3d Cir. 2001) (stating that the "Herculean task" of calculating individual damages from hundreds of millions of different transactions "counsels against finding predominance"). The District Court concluded that Plaintiffs, through their expert Dr. McClave, provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis. 264 F.R.D. at 191. Comcast assails that determination as an abuse of discretion.

A.

The District Court examined the methodology, conclusions, and criticisms of the experts on both sides, before providing its conclusions. 264 F.R.D. at 181-191. (Comcast does not contest that the Court performed the "rigorous analysis" required by *Hydrogen Peroxide*.) Because on appeal Comcast renews the arguments it made to the District Court, we set forth each side's position in the District Court and the Court's response.

Plaintiffs' damages expert, Dr. McClave, concluded that the prices in the Philadelphia market were consistently and substantially higher than the prices in areas of effective competition. 264 F.R.D. at 181. His econometric analysis demonstrated that the alleged antitrust impact was class-wide, because the prices were elevated above competitive levels across all class members and for the entire time period. *Id.* For his methods, Dr. McClave constructed "but-for" prices against which to compare the prices Comcast charged in the Philadelphia DMA. "But-for" prices are those that would have existed absent the alleged anticompetitive conduct. To construct the "but-for" prices, he first selected comparable "benchmark"

counties around the country by applying two "screens" to determine whether the counties represented a level of competition similar to what Comcast would have faced in the Philadelphia market absent its alleged anticompetitive conduct. It is important to understand these two screens. The first screen—the "market share screen" or "40% screen"—required that the county have a Comcast subscriber penetration rate of less than 40%. App. 03410. Dr. McClave chose 40% because it represented the approximate midpoint of Comcast's penetration rate in the Philadelphia DMA (between approximately 20% in 1998 and 60% from 2003 through 2008). He chose this number also because it allowed for growth during the class period but focused on markets where Comcast was likely to have less market power than it does in the Philadelphia market. *Id.* The second screen—the "Direct Broadcast Satellite screen", or "DBS screen"—required that the county be in a Designated Market Area where the penetration level for Alternative Delivery Systems (which essentially includes DBS, but also master antenna systems and multipoint distribution systems) was at or higher than the national average of Alternative Delivery Systems penetration rates in Comcast markets.[11] Using data from the counties that fit the two screens,

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[11] Dr. McClave used Alternative Delivery Systems penetration rates as a proxy to measure Direct Broadcast Satellite penetration rates. App. 03410 n.11. Comcast's expert, Dr. Chipty, referred to the screen as the "DBS screen," and as measuring DBS penetration rates. App. 03834. The parties and District Court have continued using the DBS terminology. Although the screen technically measured Alternative Delivery Systems penetration rates, we will use the parties' terminology and refer to it as the "DBS screen" and as measuring Direct Broadcast Satellite penetration rates.

Dr. McClave performed a multiple regression analysis to compare actual prices in the Philadelphia DMA to the estimated "but-for" prices. He then applied the overcharge percentage to the relevant revenue obtained by Comcast for expanded basic service in the Philadelphia market during the class period to reach a final conservative estimated overcharge value: $875,576,662.

Comcast's experts, Dr. Teece and Dr. Tasneem Chipty, contested several parts of Dr. McClave's methodology, and questioned his results. 264 F.R.D. at 183. First, they challenged both benchmark screens used by Dr. McClave. Regarding the "DBS screen," Dr. Teece asserted that Dr. McClave erroneously chose the higher national Direct Broadcast Satellite penetration rate, instead of the lower regional rate predicted by Plaintiffs' experts Dr. Singer and Dr. Williams. The District Court rejected the critique, stating that Dr. McClave "used his national average DBS penetration screen as a descriptor of typical competitive market conditions," and was not attempting to predict the Direct Broadcast Satellite penetration rate of the Philadelphia DMA. *Id.* at 184. Regarding the "market share screen," Dr. Chipty contended that because Comcast was present in only a few counties in 1999, its actual market share was much higher in the counties where it was and 0% where it was not; as a result, the less-than-40% penetration rate provided an inappropriate screen. App. 03833. The District Court rejected the criticism as unsupported by the record, stating that Dr. Chipty should have presented evidentiary data to show that 40% was an incorrect midpoint estimate or average rate. 264 F.R.D. at 184. The Court also noted that the 40% screen was supported by the evidence as Comcast's approximate share of the Phila-

delphia DMA at the midpoint of the class period. *Id.* at 184 n.43.

Second, Dr. Chipty faulted Dr. McClave's model for failing to consider properly demographic variables among the counties: specifically, for omitting the variables of population density and the number and type of households. The District Court credited as well-supported Dr. McClave's response as to why he omitted population density: it is correlated with medium household income (which he included) and using it as well as household income would create confounding and unreliable results. 264 F.R.D. at 185-186. Additionally, according to Dr. McClave, adding it would mask the effects of anticompetitive influences because higher population density results in lower costs per subscriber. *Id.* at 185. The Court noted that Dr. Chipty's use of population density as a variable resulted in it being positive and statistically significant in one model but negative and statistically significant in another. *Id.* at 186. Moreover, the Court added that Federal Communications Commission and Government Accountability Office studies included population density but found it was not a statistically significant variable. *Id.*

Third, Dr. Chipty criticized Dr. McClave's model for comparing list prices for expanded basic cable in the Philadelphia DMA against the benchmark counties. She opined that Dr. McClave's model did not take into account the significant number of promotions and discounts offered to Comcast customers. *Id.* at 187. Dr. Chipty offered several rebuttal models that included population density and discounted prices, which resulted in significantly lower or even negative damages. The Court rejected Dr. Chipty's models as "suffer[ing] significant flaws." *Id.* at 188,

189. It stated that Dr. McClave's model accounted for discount prices in the formula (not model) when he multiplied anticompetitive overcharge by Comcast's relevant revenues (because Comcast receives revenue only for prices charged, the revenue side of the formula by definition includes discount prices). Accordingly, by adding discount prices to the model as well, Dr. Chipty's model doubly counted the discount. The Court also noted that, as Dr. McClave explained, more than 80% of Comcast's customers pay list price for expanded basic cable, and discounts from list prices are temporary (after which they return to list price). As to another of Dr. Chipty's models, which calculated damages through direct calculations instead of multiple regression, the Court rejected it in the words of Dr. McClave as a "novel and non-standard formula for calculating damages." *Id.* at 189.

Fourth, the District Court rejected Dr. Chipty's attempt to impeach Dr. McClave's model by using it to calculate damages for basic cable prices, instead of expanded basic cable. *Id.* at 190. The Court explained that Dr. McClave's model aimed to analyze only expanded basic cable, because Comcast alters its prices at the expanded level, so "any application of the McClave model to [basic cable prices] explains nothing." *Id.* Comcast does not contest that ruling.

Fifth and finally, the Court asked the parties after the hearing how to interpret Dr. McClave's damages model if it credited at least one, but not all, of Dr. Williams's four theories of antitrust impact. *Id.* It determined that Dr. McClave's damages model was still viable, even if it rejected some theories of antitrust impact, explaining that Dr. McClave selected benchmarks to isolate the effect of anticompet-

itive conduct, and that his use of the DBS screen was "entirely unrelated" to Dr. Williams's DBS foreclosure theory. *Id.* The Court concluded that Dr. Williams's theories of antitrust impact were not relevant to Dr. McClave's methods of choosing benchmarks because "[a]ny anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties." *Id.* at 191.

B.

Comcast contends that the District Court exceeded its discretion in accepting Plaintiffs' proposed damages calculation methodology. Its arguments are recast versions of those rejected by the District Court. First, Comcast contends that Dr. McClave's damages theory was based on all of Plaintiffs' alleged anticompetitive effects, but the District Court rejected three of Plaintiffs' four theories. Because Dr. McClave stated that his model was based on the cumulative effect and could not isolate damages for individual theories of harm, according to Comcast the District Court erred in accepting the damages model. Second, Comcast asserts that the economic assumptions underlying the damages model lack foundation in the record evidence. According to Comcast, both screens employed by Dr. McClave are factually unsupported and economically unsound: the "DBS penetration screen" because the Court rejected Dr. Williams's Direct Broadcast Satellite foreclosure theory, and the "market share screen" because it bears no relation to the conditions that would have existed in the Philadelphia region but for the complained-of conduct. Third, Comcast contends that the damages model is flawed because it fails to include population density as a variable, and because it calculates damages based on list prices, which fails

to consider the discounted prices that some subscribers actually pay.[12]

Plaintiffs remind us that the District Court already thoroughly considered and rebutted each of the points that Comcast now raises. As to the specific contentions, first, the class asserts that the District Court explicitly held that Dr. McClave's model was suitable for calculation of damages on all or individual theories of liability. Second, the class emphasizes that the damages model provides a methodology that can establish damages on a class-wide basis using common proof, and that Comcast ignores the proper inquiry at class certification and instead prematurely attacks the merits of the model. As a result, Comcast's arguments concerning the benchmarks miss the point. Third, the class asserts that Dr. McClave had ample justification to omit population density as a variable, and that the damages model incorporates discount prices.

X.

We pause to identify the forest for the trees. If allowed to proceed to trial, the class must establish that the injury it suffered from the violation of the antitrust laws is measurable. *See Hydrogen Peroxide*, 552 F.3d at 311; *see also Newton*, 259 F.3d at 188 ("Proof of injury (whether or not an injury occurred

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[12] Following the Supreme Court's decision in *Wal-Mart*, Comcast added that Dr. McClave's damages model, like the expert model in Wal-Mart, could be "safely disregard[ed]." *See Wal-Mart*, 131 S. Ct. at 2554. We disagree. The factual and legal underpinnings of *Wal-Mart*—which involved a massive discrimination class action and different sections of Rule 23—are clearly distinct from those of this case. *Wal-Mart* therefore neither guides nor governs the dispute before us.

at all) must be distinguished from calculation of damages (which determines the actual value of the injury)."). The usual measure in an overcharge case "is the difference between the illegal price that was actually charged and the price that would have been charged 'but for' the violation multiplied by the number of units purchased." Areeda *et al., supra*, ¶ 392a. Given the inherent difficulty of identifying a "but-for world," we do not require that damages be measured with certainty, but rather that they be demonstrated as "a matter of just and reasonable inference." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference . . . ."); *see also Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1273 (3d Cir. 1995) (citing *Story Parchment* and explaining that "damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts").

The inquiry for a district court at the class certification stage is whether the plaintiffs have demonstrated by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof. *See Hydrogen Peroxide*, 552 F.3d at 325. Some variation of damages among class members does not defeat certification. *See* 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1781 (3d ed. 2005) (stating for antitrust class certification that "it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate."). Complex and individual questions of damages, however, weigh

against finding predominance. *Compare Newton*, 259 F.3d at 187 (reasoning that having to examine proof of the circumstances of hundreds of millions of individual transactions counseled against finding predominance), *with Linerboard*, 305 F.3d at 157-158 (determining that, in contrast to *Newton*, all purchasers were affected by the increased price). As the Court of Appeals for the First Circuit explained:

> It is true that the validity of plaintiffs' theory is a common disputed issue. It will be for the fact finder to decide whether this theory is persuasive. At the class certification stage, however, the district court must still ensure that the plaintiffs' presentation of their case will be through means amenable to the class action mechanism. We are looking here not for hard factual proof, but for a more thorough explanation of *how* the pivotal evidence behind plaintiff's theory can be established. If there is no realistic means of proof, many resources will be wasted setting up a trial that plaintiffs cannot win.

In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 29 (1st Cir. 2008) (citation omitted); *see also Areeda et al., supra*, ¶ 331 (explaining for the issue of damages that "courts will not permit class actions unless they can devise a practical means for their litigation").[13]

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[13] In response to the Concurrence-Dissent's position that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies at the stage of class certification, *see* Slip Concurrence-Dissent Op. at 16, we make two observations. First, as the Opinion acknowledges, "in neither the District Court nor before us" did Comcast raise this issue, *id.* at 17 n.18, and it is therefore not properly before us. Second, although the Supreme

[Footnote continued on next page]

On appeal, the inquiry narrows. Because the District Court held that Plaintiffs had established they could measure damages through common proof, we examine whether that determination was beyond the Court's discretion. Having identified the forest of law, we proceed to scrutinize the timber that Comcast faults as rotted.

A.

Comcast contends that Dr. McClave's model cannot isolate damages for individual theories of harm, and that it therefore cannot distinguish between lawful and unlawful competition. Comcast cites *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338,

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Court recently hinted that *Daubert* may apply for evaluating expert testimony at the class certification stage, it need not turn class certification into a mini-trial. *Wal-Mart*, 131 S. Ct. at 2553-54. We understand the Court's observation to require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage. This is consistent with our jurisprudence which requires that at class certification stage, we evaluate expert models to determine whether the theory of proof is plausible. *Hydrogen Peroxide*, 552 F.3d at 324. "[I]f such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence." *Id.* at 325. When plaintiffs present multiple models created by expert witnesses that can show common evidence and those models are based on data, a district court does not have to determine which model should be used at the time of class certification. *Linerboard*, 305 F.3d at 155. Here, the District Court likely determined that Dr. McClave's model could be refined between the time when class certification was granted and trial so as to comply with *Daubert*.

1353 (3d Cir. 1975), and *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000). In both cases, following adverse jury verdicts, the courts held that the experts' theories of damages were "speculation"—not "just and reasonable inferences"—because the models did not distinguish between the effects of lawful and unlawful competition. In *Coleman*, we quoted the guidepost of *Story Parchment*: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Coleman*, 525 F.2d at 1353 (quoting *Story Parchment*, 282 U.S. at 562).

We are not persuaded by Comcast's argument. To measure damages, Dr. McClave used screens to select and average benchmark counties against which to compare the actual Philadelphia market. The screens themselves were not intended to calculate damages, but instead to construct an estimated competitive "but-for" Philadelphia market (a market absent the alleged anticompetitive conduct). For example, although the screens incorporated Direct Broadcast Satellite penetration rates, those rates were included to estimate typical competitive market conditions, not to calculate liability for the foreclosure of DBS competitors.[14] The model then calcu-

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[14] The Concurrence-Dissent misreads this observation as addressing the on-the-merits validity of the DBS screen. Slip Concurring-Dissenting Op. at 25-27. We address Comcast's contention regarding the merits of the DBS screen, however, *infra* Part X. This observation indicates simply that the exclusion of the DBS foreclosure theory of liability does not render Dr. McClave's damages methodology incapable of calculating

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lates damages by comparing actual prices to the constructed "but-for" market. Differences between actual prices and "but-for" prices reflect anticompetitive impact. In other words, the model calculates supracompetitive prices regardless of the type of anticompetitive conduct. Further, the model uses standard econometric methodology to calculate damages. *See generally* Areeda et al., *supra*, ¶ 394 (detailing the basic steps in calculating antitrust damages). Indeed, as Dr. McClave highlighted, Comcast's expert Dr. Chipty employed the same methodological approach—identify a suitable benchmark and employ multiple regression analysis to control for differences—to estimate damages on a class-wide basis. App. 04041 ("Dr. Chipty and I agree that the application of multiple regression analysis to compare Philadelphia to a suitable benchmark is an appropriate methodology that can be applied on a classwide basis to quantify the amount of economic damages in this case.").

As a result, if the class proves at trial that Comcast engaged in anticompetitive behavior, it can use the constructed "but-for" market to measure the anticompetitive impact on the class members. At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations. *Cf.*

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damages on a class-wide basis if the class can prove that Comcast engaged in anticompetitive behavior.

Newton, 259 F.3d at 187. We are satisfied that Plaintiffs' damages model meets this burden.[15]

Additionally, the cases that Comcast offers are distinguishable on multiple grounds. Most to the point, those cases considered the merits of experts' theories following adverse jury verdicts; here, we address only whether Plaintiffs have provided a method to measure and quantify damages on a class-wide basis. We have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative. And, to the extent Comcast worries about distinguishing between lawful and unlawful conduct, Dr. McClave's damages methodology does not suffer from the defects present in those cases because it constructs a competitive "but-for" world that includes lawful competition, not a hypothetical one bereft of both lawful and unlawful competition. *See Concord*, 207 F.3d at 1056-1057

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15 The Concurrence-Dissent states that Dr. McClave's damages theory can establish damages only in the five counties where RCN attempted to overbuild. This concern misses the central theory of Plaintiffs' case: by deterring the entry of overbuilders through clustering, Comcast allegedly maintained higher prices across the *entire market area*. Dr. McClave's damages model appropriately reflected a "but-for" world by accounting for overbuilding only in the five counties where RCN attempted to overbuild, and his resulting calculations showed that—taking the limited actual overbuilding into account—"the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination." App. 03412. Additionally, the Concurrence-Dissent apparently takes up the mantle of an additional Comcast expert and raises multiple arguments against Dr. McClave's damages model not addressed by Comcast's experts at the District Court level nor advanced by Comcast on appeal. We must limit our review to the issues presented by Appellants and Appellees. We are not permitted to embark on an intellectual adventure of our own.

(model was "mere speculation" because it ignored inconvenient evidence, failed to account for external market events, and did not incorporate economic reality of market); *Coleman*, 525 F.2d at 1352-1353 (model premised on hypothetical world without even lawful competition).[16]

B.

Comcast's remaining arguments contest specific parts of Dr. McClave's damages methodology. These contentions are a renewal of those it made to the District Court, each of which the Court rejected. For those determinations to be beyond the Court's discretion, Comcast must convince us that the Court's acceptance of the pieces of Dr. McClave's methodology was clearly erroneous.

At the outset, we agree with the class that the heart of Comcast's arguments are attacks on the merits of the methodology that have no place in the class certification inquiry. Even if we were to overrule as clearly erroneous the District Court's findings on all four contested pieces of Dr. McClave's methodology—i.e., modify both of Dr. McClave's screens,[17]

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[16] Comcast adds that because overbuilding occurs at the franchise level, Dr. McClave's county-to-county metric cannot calculate damages if the jury finds that only some (if any) franchises were impacted. First, Dr. McClave indicated that franchises within counties often have identical or nearly identical pricing, which assuages Comcast's concern. *See* App. 03409. Second, Comcast is attempting again to redefine the relevant market: inasmuch as Plaintiffs have established that the relevant geographic market can be the Philadelphia DMA, *see supra* Part IV.A, their damages model passes muster at this stage of the proceedings.

[17] The Concurrence-Dissent—unlike Comcast's experts, Comcast's lawyers and the District Court—identifies a "third

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add population density as a variable, and incorporate Dr. Chipty's proposed method for calculating discounts—only the final amount of estimated damages would change. *See* App. 03082 (Hr'g Ex.) (chart demonstrating differing damages amounts based on different model specifications, including Dr. Chipty's suggested specifications); App. 04557 (Dr. McClave Supplemental Decl.) (damages remain class-wide and substantial even using Dr. Chipty's proposed methodology, after correcting for two obvious errors). Comcast's assertions do not impeach the District Court's ultimate holding that damages are capable of common proof on a class-wide basis. *See Behrend*, 264 F.R.D. at 191; *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) ("Indeed, we have never required a precise mathematical calculation of damages before deeming a class worthy of certification."). All of the cases Comcast proffers examine damages models *on their merits* following adverse jury verdicts. For reasons explained above, these cases do not address the question at the class certification stage. Because Comcast's contentions do not cast doubt on the District Court's holding that Plaintiffs will be able to measure class-wide damages through a common methodology, we decline to consider them further. *See Hydrogen Peroxide*, 552 F.3d at 317 (describing the Supreme Court's rule

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screen." Slip Concurring-Dissenting Op. at 22. Again, this "screen" was not raised by the parties before us and we do not address it (we doubt additionally that it is a screen: the two screens were used to select benchmark counties, whereas the presence of overbuilders was an identification attached to the already-selected benchmark counties for purposes of performing a multiple regression analysis, *see* App. 03412, 03421 (Corrected McClave Decl.)).

prohibiting consideration of the merits if not "necessary" for purposes of Rule 23) (citing *Eisen*, 417 U.S. at 177).

Plaintiffs have provided a common methodology to measure and quantify damages on a class-wide basis. The District Court acted within its discretion in so finding.[18]

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[18] The Concurrence-Dissent expresses its additional concern over using mathematical averages across the Philadelphia DMA, given the potential variation among the franchise areas. Once again, this concern is notably absent from Comcast's briefing (except as already addressed above regarding the screens and demographic variables). Nor does the Concurrence-Dissent grapple with the abuse-of-discretion standard of review we must apply to the District Court's acceptance of Dr. McClave's damages model. We also note in passing that the Concurrence-Dissent overstates the degree of dissimilarity among the franchise areas. It recognizes that Dr. McClave's model examines actual prices on a county-by-county level, *see* Slip Concurring-Dissenting Op. at 39-40 n.36, but fails to note, as Dr. McClave explained: "Many franchises within counties often have identical or nearly identical pricing. More price variability, and thus from an econometric perspective more information about prices and their determinants, is obtained by aggregating prices at the county level." App. 03409 (Corrected McClave Decl.). Not even Comcast's expert contested this reasoning. *See* App. 03831 (Chipty Decl.); App. 03954 (Chipty Rebuttal Report). Finally, to the extent the Concurrence-Dissent questions the appropriateness of using county-level statistics to measure damages across the entire Philadelphia DMA, we observe that this question was contested strenuously and repeatedly by the experts on both sides at the District Court level. *See* App. 03410 (Corrected McClave Decl.) (explaining choice of market share screen); App. 03833 (Chipty Decl.) (contesting market share screen); App. 04066 (McClave Rebuttal Decl.) (defending market share screen); App. 03961 (Chipty Rebuttal Report) (disputing screen again); App. 04262 (McClave Reply Decl.) (responding to Dr. Chipty's criticisms of screen). After reviewing the reports and hearing careful examination of the experts on this point,

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XI.

The District Court certified the class for resolution of four claims. Comcast contends that the District Court erred by certifying the following claim:

> Whether Defendants conspired with competitors, and whether Defendants entered into and implemented agreements with competitors, to allocate markets, territories, and customers for cable television services; *and whether such conduct is a per se violation*, or whether it constitutes a restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

App. 00031 (emphasis added). According to Comcast, the District Court lacked any legal authority to certify a per se claim based on the class's allegations.

This is a merits issue beyond the scope of our Rule 23(f) jurisdiction. Comcast misconstrues the District Court's certification order. The Court certified the class and stated that one of the questions to be litigated is whether there has been a per se violation. It did not declare that a per se violation had oc-

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the District Court found that Dr. McClave's 40% county-level market-share screen was "supported by the evidence" and that Dr. Chipty's rebuttal was not supported by appropriate data. 264 F.R.D. at 184. Through a clearly erroneous lens, we may not reverse a District Court's factual finding if we would weigh the evidence differently; instead, the Court's finding must be implausible in light of the record, *Anderson*, 470 U.S. at 573-574, or completely devoid of minimum evidentiary support displaying some hue of credibility, *Krasnov*, 465 F.2d at 1302. The Concurrence-Dissent breezes past this formidable standard of review to reach its own factual finding.

curred. Appeals taken pursuant to Rule 23(f) do not furnish the proper vehicle to address the merits of Plaintiffs' antitrust claims. *See McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 390 (3d Cir. 2002) (describing the "scrupulous" limits of Rule 23(f) jurisdiction). Comcast appeals from the District Court's determination that questions of law or fact common to class members predominate, which was the only issue before the District Court. *See* App. 00029 (District Ct. Certification Order) ("The only class certification element that remained in dispute was the requirement of Fed. R. Civ. P. 23(b)(2) that common issues of law and fact predominate."). Comcast itself stipulated as much. *See* App. 00436 (Comcast Letter to the District Ct., Mar. 25, 2009) ("With respect to the issues to be addressed in a new class certification motion, Comcast is prepared to stipulate that the only issues to be resolved are those of antitrust impact and methodology of damages . . . ."). Comcast's request to have us declare on the merits that Plaintiffs cannot establish a per se antitrust violation is beyond the scope of the certification decision from which Comcast appeals pursuant to Rule 23(f). Accordingly, we do not reach this contention.

* * * * *

We have considered carefully all the contentions presented by the parties. Plaintiffs have demonstrated that this case can proceed as a class action. Comcast has not carried its burden to convince us otherwise. Accordingly, we will AFFIRM in all respects the District Court's Order certifying the class.

JORDAN, Circuit Judge, concurring in the judgment part and dissenting in part

I agree with the Majority's conclusion, though not its reasoning, with respect to the question of antitrust impact, and I therefore join in holding that the District Court did not abuse its discretion when it determined that Plaintiffs could establish antitrust impact through evidence common to a class comprising Comcast cable television customers in the Philadelphia DMA.[1] But because I conclude that damages cannot be proven using evidence common to that entire class, I would vacate the certification order to the extent it provides for a single class as to proof of damages, and I would remand the case to the District Court to consider whether the class can be divided into subclasses for the purpose of proving damages. I therefore respectfully dissent in part.[2]

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[1] I adopt the defined terms, such as "DMA," as used in the Majority opinion.

[2] Although the Majority opinion decides the question of certification for a single class comprising Comcast customers in the Philadelphia DMA, it should be noted that its decision will become a template for resolving similar class certification questions pending in cases involving the Chicago and Boston media markets (*see* Slip Op. at 10 & n.5), and in all likelihood it will be cited in other lawsuits against cable television service providers (*cf.* App. at 3652 (Williams Dec.) (explaining that, as part of Comcast's swaps and acquisitions, "Adelphia received Comcast's cable systems and subscribers located in Palm Beach, Florida and Los Angeles, California")). Thus, the problems in the Majority's reasoning will have practical repercussions far beyond this case. I therefore write not only because I cannot join the Majority in permitting Plaintiffs to pursue damages on a class-wide basis, but also to provide a counterpoint to the Majority's analysis for future consideration.

As the Majority explains, Plaintiffs' claims have three elements, (1) an antitrust violation, (2) antitrust impact, and (3) damages (*see* Slip Op. at 17 (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008)).[3] In pursuing its motion to decertify the initial class, however, Comcast effectively conceded that there was predominance with respect to the element of an antitrust violation, stipulating that it was contesting only "the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages." (App. at 438.) When the District Court granted Comcast's motion,[4] it accepted that stipulation and instructed the parties that, moving forward, they "need only address these discrete issues." (*Id.*) On appeal, after the District Court once more certified a class, Comcast has again limited its arguments to addressing predominance as to impact and damages. We are therefore faced with two related ques-

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[3] Plaintiffs make separate claims for violation of both § 1 and § 2 of the Sherman Act, but each of those claims contains the three elements described above, with only the nature of the particular antitrust violation differing. *Compare Hydrogen Peroxide*, 552 F.3d at 311 (listing the elements of a § 1 claim as "(1) a violation of the antitrust laws – here, § 1 of the Sherman Act, (2) individual injury resulting from that violation, and (3) measurable damages"), *with Am. Bearing Co. v. Litton Indus.*, 729 F.2d 943, 948 (3d Cir. 1984) (listing the elements of a § 2 claim as "(1) an antitrust violation, in this case a violation of section 2 of the Sherman Act; (2) fact of damage or injury; and (3) measurable damages").

[4] Because Comcast had moved to decertify the class entirely before stipulating to all issues other than the predominance questions described above, the District Court, which construed the motion to decertify as a motion for reconsideration, granted the motion only with respect to those predominance issues and denied it with respect to all other issues. (App. at 437.)

tions: First, whether the District Court abused its discretion by holding that, as required by Federal Rule of Civil Procedure 23(b)(3), common issues of law or fact predominate with respect to the question of antitrust impact, and, second, whether the District Court abused its discretion by likewise holding that common issues of law or fact predominate with respect to the question of damages.[5]

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[5] While not expressed, the requirement that there must be predominance with respect to both antitrust impact and damages appears to be accepted by the parties and the Majority, and I likewise accept that predominance is issue specific. *See, e.g., Hydrogen Peroxide*, 552 F.3d 305 at 311 ("We examine the elements of plaintiffs' claim through the prism of Rule 23," to determine whether "proof of the essential elements of the cause of action requires individual treatment." (internal quotation marks omitted)); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001) ("To determine whether the claims alleged by the putative class meet the requirements for class certification, we must first examine the underlying cause of action .... If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.") Of course, where only some elements of a claim require individual treatment, while others can be litigated collectively, it may be appropriate to certify a class for those elements that can be treated collectively, while certifying subclasses or requiring individual treatment for those that cannot. *See, e.g.*, FED. R. CIV. P. 23(b)(4), advisory committee's notes (explaining that application of Rule 23(c)(4)'s provision allowing "that an action may be maintained as a class action as to particular issues only" may be appropriate where, for instance, liability can be proven class wide, but damages cannot); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 231 (2d Cir. 2006) (remanding to district court with instructions to certify a class for liability and to consider whether to also certify for damages or to, alternatively, certify subclasses for damages).

The Majority opinion skillfully lays out the legal requirements for predominance and the standard under which we must review the District Court's decision, and there is no need to repeat that legal background. I emphasize, however, the instruction from *Hydrogen Peroxide* that the question of predominance hinges on whether the elements of a class claim are "capable of proof at trial through evidence that is common to the class rather than individual to its members." 552 F.3d at 311-12. With that requirement in mind, I address the contested elements in turn.

I. Whether Antitrust Impact Can Be Proven Using Evidence Common To The Class

In seeking class certification, Plaintiffs initially presented four theories of antitrust impact.[6] The District Court rejected three of them,[7] leaving Plain-

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[6] Those theories were: (1) that Comcast's high market share resulting from clustering made it profitable for Comcast to deny Comcast SportsNet to DBS providers, which lowered DBS penetration rates and allowed Comcast to raise prices; (2) that Comcast's clustering reduced "benchmark competition" (the ability of customers to compare service and prices among competing providers), which allowed Comcast to raise prices; (3) that Comcast's market power increased its bargaining power vis-à-vis content providers, which allowed it to raise prices for its services; and (4) that Comcast's clustering deterred competition from overbuilders, allowing Comcast to raise prices.

[7] The District Court rejected the theory that clustering reduced DBS penetration because it found that Comcast's denial of Comcast SportsNet to DBS providers predated and was unrelated to clustering. It rejected the theory that clustering reduced benchmark competition because Plaintiffs had provided no evidence that television consumers actually engaged in benchmark competition. It rejected as "wholly unsupported"

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tiffs with only a single theory of antitrust impact: that Comcast's clustering reduced overbuilding[8] and, therefore, increased prices. Like the Majority, I see no abuse of discretion in the District Court's holding that antitrust impact may be proven using evidence that clustering reduced overbuilding and so caused increased prices. Thus, I agree with my colleagues in the Majority that the element of antitrust impact is at least capable of proof on behalf of some class of consumers. The more complicated question, as I see it, is whether antitrust impact is capable of proof for a class encompassing all Comcast customers in the Philadelphia DMA, through the use of common evidence.[9] On that issue too I agree with the Majority's holding that the District Court was within its discretion to conclude that the Philadelphia DMA is the appropriate geographic region within which antitrust

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the theory that increased bargaining power vis-à-vis content providers increased prices.

8 "Overbuilding," as the Majority explained, is where a second cable provider – the "overbuilder" – "builds and offers customers a competitive alternative where a telecommunications company already operates." (Slip Op. at 9.) The existing provider is often referred to as the "incumbent" provider.

9 The geographic scope of the class is actually defined as Comcast's Philadelphia cluster, which, as noted by the Majority, excludes the DMA counties of Lehigh and Northampton. As Dr. Chipty explains, those are the two counties in which Comcast has no presence (*see* App. at 3795 & n.12 (Chipty Reply Dec.)), and, therefore, they would be excluded from the class regardless of its geographic scope. For ease of reference, I refer to the class as encompassing the Philadelphia DMA, rather than the Philadelphia Cluster, recognizing that those DMA counties in which there are no Comcast customers are not included in the class.

impact can be proven with common evidence. I do not agree, however, with the Majority's reasoning in support of that conclusion.

Much confusion has been caused in this case by the conflation of two distinct concepts: the antitrust concept of "relevant geographic market," which has traditionally been defined as the smallest area within which a monopolist can exercise market power,[10] and the class action concept of a "class definition," which gives the parameters of a set of plaintiffs as to whom the elements of a claim can be proven using common evidence.[11] Because, in this case, the class

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10 For example, the Federal Trade Commission defines "relevant geographic market" as the region in which a hypothetical monopolist "would impose at least a [small but significant nontransitory price increase] on some customers in that region" without "this price increase [being] defeated by substitution away from the relevant product or by . . . customers in the region travelling outside it to purchase the relevant product." FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES 14-15 (2010). *Cf.* PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 5-30 (2010) ("[T]he relevant inquiry" for identifying a geographic market is "how far [customers] are willing to travel in order *to avoid* paying the defendant monopoly prices.").

11 *See In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 639 n.22 (3d Cir. 2011) (explaining that, pursuant to Rule 23(c)(1)(B), the class definition describes both "which individuals and entities are included" and the "claims, issues or defenses to be treated on a class basis"). While Rule 23(c)(1)(B) does not expressly state that the class should include only those for whom the defined claims can be proven by common evidence, it is apparent that any class must be defined in a manner consistent with all Rule 23 requirements, including commonality and predominance. *Cf. id.* at 639 & n.22 (explaining that the question of whether there was predominance when it was alleged that some members of a proposed class "would be unable to demon-

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definition includes a geographic component, the term "relevant geographic market" has been used equivocally by the parties, the District Court, and the Majority to describe both the area affected by antitrust impact and the area within which potential class members reside – the latter area being what I will call, for lack of a better term, the "class region."[12] The problem with that equivocal usage is that the relevant geographic market and the class region are not necessarily coterminous. Even if we assume that, within the Philadelphia DMA, there are many distinct geographic markets that are relevant for antitrust purposes, as Comcast argues, that does not mean that Plaintiffs cannot prove, by common evidence, that Comcast's acts caused antitrust impact within all of them. As a theoretical matter, class proof can cover multiple relevant geographic markets, and, indeed, other Courts of Appeals have so held. *See, e.g., In re Sugar Antitrust Litig.*, 559 F.2d 481, 483-84 (9th Cir. 1977) (rejecting the argument that a class could not be certified "where the antitrust claims involve a variety of geographic and product markets"); *Windham v. Am. Brands Inc.*, 539 F.2d 1016, 1018 (4th Cir. 1976) (holding that a district court abused its discretion in refusing to certify

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strate loss causation," was an issue of "which individuals and entities are included in the putative class . . . primarily relevant to class definition").

12 The class region will not necessarily be the same with respect to each element of a class's claims. In fact, even in this case, the class region differs with respect to antitrust impact and damages because, for the reasons I identify *infra* Part II(B), antitrust impact can be proven using common evidence across a wider region than damages can be.

an antitrust class that encompassed "11 different geographic markets").

While the relevant geographic market and the class region are conceptually distinct,[13] the Majority, like the District Court, initially attempts to identify the class region in terms of the relevant geographic market. Unlike the District Court, however, the Majority decides that because "[d]efining the relevant geographic market . . . is an issue of the merits," the question of the relevant geographic market is "not properly before us." (Slip Op. at 20-21.)

The Majority is correct that defining the relevant geographic market is not a task we need to undertake at this stage, but that is not because the task takes us into the merits. It is rather because, regardless of whether there are one or many relevant geographic markets associated with the Philadelphia DMA, the question before us at this juncture is whether there is some class, in this case defined geographically, that can be shown, through common evidence, to have experienced elevated prices as a result of reduced overbuilding because of Comcast's clustering. Should that region include only those franchise areas involved in the Cable System Transactions?[14] Should it include only those franchise ar-

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13 That is not to say that a class region and a relevant geographic market will always be different. An antitrust violation may often affect people in only a single geographic market, in which case the relevant geographic market and the class region would be in essence the same.

14 The Cable System Transactions are, as described by the Majority, the transactions through which Comcast "clustered" its franchise areas by "contract[ing] with competing cable providers to either acquire them or to 'swap' cable systems it

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eas in which RCN was licensed to overbuild, but did not? Should it encompass the Philadelphia DMA or some lesser or greater area? The Majority does not ask those questions, but, instead, after determining that Plaintiffs can attempt to prove that the relevant geographic market is the Philadelphia DMA, the Majority assumes that that also means that the class is properly defined to cover the Philadelphia DMA and, therefore, that Plaintiffs can prove by common evidence that clustering reduced overbuilding and increased prices throughout the DMA. (*See, e.g.*, Slip Op. at 51-52 n.16 (dismissing Comcast's argument that overbuilding should be analyzed at the franchise level because "Plaintiffs have established that the relevant geographic market can be the Philadelphia DMA").) Fortunately, what the Majority assumes, namely that the Philadelphia DMA is the appropriate class region for proving antitrust impact, is supportable.

A compelling argument could be made that the class should consist only of those people living in franchise areas where RCN was licensed to overbuild, because only those franchise areas that would otherwise have been overbuilt could have been affected by the elimination of that overbuilding.[15] Be-

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owned in areas outside the Philadelphia DMA for cable systems within the Philadelphia DMA." (Slip. Op. at 5.)

15 At least, Plaintiffs have provided no evidence that persons outside of franchise areas that would otherwise have been overbuilt can be affected by the elimination of that overbuilding. Dr. Williams opines that, where some parts of a franchise area are overbuilt, the overbuilding can affect prices in other parts of that same franchise area that are not overbuilt. (App. at 3704-14 (Williams Dec.) (explaining that where competing cable
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cause RCN was licensed to overbuild only five of the eighteen Philadelphia DMA counties (*see, e.g.*, App. at 3640 (Williams Dec.); App. at 4284-85 (Singer Reply Dec.)), that would suggest limiting the class region to those five counties.[16] Nonetheless, both Dr. Williams and Dr. Singer opined that, had RCN successfully overbuilt the five counties in which it was already licensed, it would have continued overbuilding into the remainder of the Philadelphia DMA. (App. at 4285 (Singer Reply Dec.) ("[H]ad RCN entered the five counties that it intended to . . . it is likely that RCN would have expanded its footprint beyond those five counties into geographically contiguous areas throughout the Philadelphia DMA."); App. at 4306 (Williams Reply Dec.) ("RCN likely would have continued to pursue its strategy of building into other areas in the Philadelphia DMA adjacent to its existing cable infrastructure, beyond the

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companies have "alternating franchise areas," overbuilding by one company into portions of the competitor's adjacent franchise area can affect prices in the portion of the overbuilt franchise area "that remain monopolized").) As a theoretical matter, it is also plausible that, when one franchise area has been overbuilt, the threat of further expansion by that overbuilder could put downward pressure on prices in nearby franchise areas. If such an effect is described in the multitude of expert opinions, however, the parties have not identified it. Moreover, even if there is such an effect, it would likely be attenuated by distance. It seems doubtful that overbuilding in, for instance, Bucks County, Pennsylvania would influence prices in Kent County, Delaware.

16 Given that the Class's whole theory is rooted in the premise that Comcast's clustering deterred overbuilding, it is no small matter that RCN – the only entity licensed to overbuild anywhere in the Philadelphia DMA – was licensed to overbuild in just five of the eighteen counties.

five counties.").) The District Court relied on those statements in holding that Plaintiffs had shown that the anticompetitive effects of clustering could be proven throughout the Philadelphia DMA. *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 174-75 (E.D. Pa. 2010). Though one may be skeptical that RCN would have overbuilt even the five counties in which it was licensed, let alone the remainder of the Philadelphia DMA, it was not clearly erroneous for the District Court to accept that the prospect of overbuilding throughout the DMA was capable of proof. Consequently, it was not an abuse of discretion for the District Court to hold that Plaintiffs could show, by common evidence, the antitrust impact of clustering throughout the Philadelphia DMA. Accordingly, while I do not agree with the Majority's reasoning, I agree that the District Court was within its discretion in determining that an appropriate class region for proving antitrust impact is the Philadelphia DMA.[17]

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17 The Majority responds to my efforts to identify the class region by stating that I have "misunderst[ood] an important distinction," namely that Plaintiffs have identified a "'class region' . . . of a 'Philadelphia cluster' which is distinct from the contested relevant geographic market of the "'Philadelphia DMA.'" (Slip Op. at 26 n.8.) I do acknowledge that distinction. However, that does not speak to the point because, in spite of that distinction, there remains an equivocal use of the term "relevant geographic market." That equivocation is evidenced by the Majority's statement – in response to Comcast's suggestion that franchise areas might be the appropriate class region for damages – that "Comcast is attempting to redefine the relevant market: inasmuch as Plaintiffs have established that the relevant geographic market can be the Philadelphia DMA . . . their damages model passes muster." (Slip. Op. at 51-52 n.16.)

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The Majority also asserts that there is no question about the class region because Comcast does not dispute the class region but disputes only the relevant geographic market. (Slip Op. at 26 n.8) That is not correct. While Comcast does not use the term "class region," Comcast and its experts plainly argue that the scope of the class is too broad, and they dispute the District Court's conclusion that antitrust impact can be proven by common evidence across the Philadelphia DMA. (*See, e.g*, App. at 3923 (Teece Reply Dec.) ("[E]ven if RCN would have overbuilt all five counties entirely in the but-for world, this would not be sufficient to conclude that the impact of the challenged conduct would have affected all Comcast customers in the Philadelphia DMA."); *id.* at 3922 ("I have seen no evidence that RCN ever intended to build out the entire Philadelphia DMA."); Appellants Br. at 33 (arguing that Dr. Williams's models do not show that clustering "deterred overbuilding . . . in a manner affecting all class members"); *id.* at 24-25 (noting that RCN was licensed in only five counties and arguing that Plaintiffs cannot prove that RCN would have entered the Philadelphia DMA). While I do not agree with Comcast's effort to define the class region by reference to the relevant geographic market (any more than I agree with the Majority's conflating of those concepts), to say that Comcast does not dispute the contours of the class region is not accurate, as the foregoing citations indicate.

However, even if Comcast had not disputed the class region, it would still be appropriate for us to address it. The Majority faults me for, in its view, addressing problems not raised by Comcast, which the Majority asserts are, therefore, waived. (*See, e.g.*, slip op. at 43-44 n.15 ("[T]he Concurrence-Dissent . . . raises multiple arguments . . . not addressed by Comcast's expert . . . . We must limit our review to the issues presented by Appellants and Appellees."). But "there can be no waiver . . . of the Judge's duty to apply the correct legal standard. . . . This is particularly true in the class action context, where 'the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.'" *In re Cmty. Bank of N. Virginia*, 622 F.3d 275, 302 n.20 (3d Cir. 2010) (quoting *United*

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II. Whether Damages Can Be Proven Using Evidence Common To The Class

I part ways with the Majority entirely, however, when it comes to class-wide proof of damages. The only evidence supporting Plaintiffs' claim that damages can be proven using evidence common to the class is the expert opinion of Dr. McClave. But, as

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States v. Ali, 508 F.3d 136, 144 n.9 (3d Cir. 2007) and *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)). Thus, where Comcast has raised the issues of whether there is predominance with respect to antitrust impact and damages, we are required to "apply the correct legal standard," – which is to determine whether those elements can, in fact, be proven using evidence common to the class – even if that requires us "'to conduct [our] own thorough [R]ule 23[b] inquiry.'" *Id.* (quoting *Sitrman v. Exxon Corp.*, 280 F.3d 554, 563 n.7 (5th Cir. 2002)). By disregarding the problems I have endeavored to identify, the result is an overly broad class definition and, to the extent any legitimate claims are proven, a likely dilution of recovery. Our fiduciary responsibility to absent class members requires that we ensure compliance with the provisions of Rule 23, especially those "'designed to protect absentees by blocking unwarranted or overbroad class definitions.'" *Id.* at 291 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *cf. Tri-M Group, LLC v. Sharp*, 638 F.3d 406, 416 (3d Cir. 2011) ("[T]he waiver principle is only a rule of practice and may be relaxed whenever the public interest or justice so warrants.").

Moreover, we must be cognizant of "the pivotal status of class certification in large-scale litigation," which is "often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *Hydrogen Peroxide*, 552 F.3d at 310 (internal quotation marks omitted). Pointing out analytical problems central to the certification question is no frolic and detour. It is our obligation.

detailed hereafter, Dr. McClave's testimony is incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA. Consequently, his testimony is irrelevant and should be inadmissible at trial, pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as lacking fit. Thus, it cannot constitute common evidence of damages.[18]

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[18] Although we have never explicitly held that expert testimony must satisfy *Daubert* at the class certification stage, it is implicit in both Supreme Court precedent and our precedent. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court recently expressed its "doubt" about a district court's conclusion that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." 131 S. Ct. 2541, 2553-54 (2011). In *Hydrogen Peroxide*, we explained that "opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason." 552 F.3d at 323. Inherent in that statement is the conclusion that a court could, at the class certification stage, exclude expert testimony under *Daubert*.

Even without the guidance of *Dukes* and *Hydrogen Peroxide*, simple logic indicates that a court may consider the admissibility of expert testimony at least when considering predominance. A court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything.

I recognize, of course, that in neither the District Court nor before us did Comcast describe its challenge to certification as a challenge to the admissibility of Dr. McClave's testimony. Nonetheless, while it did not use the language of *Daubert*, the substance of Comcast's challenge was that Dr. McClave's damages testimony was irrelevant and, therefore, did not fit the case. (*See, e.g.*, Appellants' Br. at 37 ("Dr. McClave admitted that his damages model takes all of the anticompetitive effects of all of the complained-of conduct as a whole, and therefore

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cannot isolate damages attributable to specific conduct or effects."); *id.* at 42 ("Dr. McClave's DBS penetration screen is substantively invalid because it bears no relation to the competitive conditions that would have prevailed in the Philadelphia region."); *id.* at 43 ("Dr. McClave's 'market share' screen is likewise invalid because it bears no relation to the competitive conditions that would have prevailed in the Philadelphia region."). The Majority protests my invocation of *Daubert*, but, regardless of whether we frame the issue as a question of fit under *Daubert* or simply ask whether the District Court abused its discretion by relying on irrelevant evidence, we are effectively asking the same question. I have chosen the terminology of *Daubert* because it is particularly apt for describing the difficulty created by the change in Plaintiffs' theory of impact and the consequent disconnect between that altered theory and Dr. McClave's expert report. The short of it is, Dr. McClave's model no longer fits the case. This observation is not, as the Majority fears, either an invitation or a demand for mini-trials in conjunction with class certification motions.

I note here as well my disagreement with the Majority's claim that, at the class certification stage, we need only "evaluate expert models to determine whether the theory of proof is plausible." (Slip Op. at 47 n.13.) The Majority supports that position by quoting *Hydrogen Peroxide*'s statement that "'if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class.'" (*Id.* (quoting *Hydrogen Peroxide*, 552 F.3d at 325).) That quotation is better understood, however, if one includes the first half of the quoted sentence, which states that "*the question at class certification is whether*, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class." 552 F.3d at 325 (emphasis added). Thus, *Hydrogen Peroxide* does not suggest that we need only "evaluate expert models to determine whether the theory of proof is plausible," as the Majority claims. To the contrary, *Hydrogen Peroxide* instructs that, even where a theory is plausible, "the question at class certification is whether" that plausible theory is susceptible to common proof. *Id.* If the only common proof offered is inadmissible expert testimony, then Plaintiffs have

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Our precedent explains that Rule 702 and *Daubert* impose three requirements for admission of expert testimony: the expert must be qualified, the expert's methodology must be reliable, and the expert's proffered testimony must fit the particular case. *See United States v. Schiff*, 602 F.3d 152, 172 (3d Cir. 2010). Testimony fits when it "'is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Id.* at 173 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). Like any relevancy determination, the question of fit is reviewed for abuse of discretion. *United States v. Ford*, 481 F.3d 215, 217-18. Here, Dr. McClave's opinion fails the requirement of "fit" because it is disconnected from Plaintiffs' only viable theory of antitrust impact, i.e., reduced overbuilding, and, thus, the proffered expert testimony cannot help the jury determine whether reduced overbuilding caused damages.[19] It was, consequently, an abuse of discretion for the District Court to consider Dr. McClave's opinion as demonstrating that damages could be proven using evidence common to the class.

As explained by the Majority, Dr. McClave arrived at his damages calculation by comparing actual cable prices in the Philadelphia DMA to prices in benchmark counties outside the Philadelphia DMA. By making those comparisons, Dr. McClave sought to identify the "but for" price of cable – that is the

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not met their burden of showing that the theory – plausible or not – is capable of common proof.

[19] I need not, and do not, question whether Dr. McClave is qualified as an expert or whether his methodology is reliable.

price that would have prevailed in the Philadelphia DMA but for the alleged anticompetitive conduct of Comcast. (App. at 3407 (McClave Dec.).) For that comparison to be relevant, however, Dr. McClave's benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA in the absence of any impact from that conduct. (*Cf.* App. at 719 (McClave Cross) (stating that the goal of his bechmarking model was to identify "counties that reflect characteristics that one would find absent . . . the effects of [Comcast's alleged anticompetitive] conduct").) And because the only surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave's comparison to be relevant, his benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding. In all respects unrelated to reduced overbuilding, the benchmark counties should reflect the actual conditions in the Philadelphia DMA, or else the model will identify "damages" that are not the result of reduced overbuilding, or, in other words, that "are not the certain result of the wrong." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *see also, e.g., Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975) ("'The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong.'" (quoting *Story Parchment*, 282 U.S. at 562)); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1494 (8th Cir. 1992) (same); *Broan Mfg. Co. v. Associated Distrib., Inc.*, 923 F.2d 1232, 1235 (6th Cir. 1991) (same).

Dr. McClave's benchmark counties fail in that regard because he formulated his model at a time when Plaintiffs had four separate theories of anti-

trust impact, and so he did not select his benchmark counties to isolate the impact of reduced overbuilding. He chose them, as one would expect, to reflect the impact of other conditions in addition to reduced overbuilding. Consequently, as described in greater detail below, once the District Court rejected Plaintiffs' other theories of antitrust impact – leaving only the reduced-overbuilding theory – Dr. McClave's model no longer fits Plaintiffs' sole theory of antitrust impact and, instead, produces damages calculations that "are not the certain result of the wrong." *Story Parchment*, 282 U.S. at 562.[20]

A. Dr. McClave's Benchmark Counties Do Not Reflect "But For" Conditions in the Philadelphia DMA

To identify his benchmark counties, Dr. McClave used three "screens." First, he screened for counties where Comcast's market share was "less than 40%," because that figure identified "markets where Comcast is likely to have less market power than it has acquired in the Philadelphia market." (App. at 3410 (McClave Dec.).) Second, he screened for counties where DBS penetration[21] was "at or above the national average" because "DBS . . . penetration was allegedly constrained by the anticompetitive behavior

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20 Whether Dr. McClave's opinion would have fit had the District Court allowed Plaintiffs to pursue all four of their theories of antitrust impact is irrelevant at this point.

21 As noted by the Majority, "DBS" stands for "direct broadcast satellite" television service. (Slip Op. at 27.) Dr. McClave actually used penetration rates for all alternative delivery systems ("ADS"), rather than just DBS systems. He opined, however, and the parties seem to agree, that "ADS is a proxy for DBS penetration rates." (App. at 3410.)

of Comcast." (*Id.*) Third, having identified counties in which Comcast's share was less than 40 percent and DBS penetration was above the national average, Dr. McClave screened for overbuilding, identifying "each of the benchmark counties . . . as either overbuilt or not overbuilt." (App. at 3411-12 (McClave Dec.).) While those screens might, if properly employed, have helped identify relevant benchmark counties in a case involving antitrust impacts beyond limited overbuilding, they fail to identify the "but for" conditions that are relevant to what is now the only impact of Comcast's allegedly anticompetitive conduct, namely the deterrence of overbuilding. They, therefore, cannot help identify damages caused by that impact. I examine the screens in reverse order.

1. The Overbuilt Counties Screen

While there are several problems in Dr. McClave's opinion that reflect the lack of fit, nothing demonstrates it with more certainty than this: For thirteen of the eighteen counties in the Philadelphia DMA, Dr. McClave's opinion does not even attempt to show that there were elevated prices resulting from reduced overbuilding. In fact, he assumes that there was no such effect.

As noted above, after identifying his benchmark counties using the market share and DBS penetration screens, Dr. McClave used a third screen to divide those counties into two groups, identifying "each of the benchmark counties . . . as either overbuilt or not overbuilt."[22] (App. at 3411-12 (McClave Dec.).)

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22 The Majority notes that the overbuilding screen is not mentioned by the parties or the District Court. (Slip Op. at 52 n.17.) While it is true that the parties do not use the terminol-

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Having done so, Dr. McClave estimated "but for" competitive prices, by comparing, on a county by county basis, prices in the eighteen actual Philadelphia DMA counties to prices in either the "overbuilt" or "not overbuilt" benchmark counties, and – crucially – he did so "assum[ing] that only the five counties that RCN indicated it planned to enter as an overbuilder would have been overbuilt." (App. at 3412 (McClave Dec.).) At the outset, therefore, it is clear that Dr. McClave assumed that elevated prices resulting from reduced overbuilding would be present in only five of the eighteen Philadelphia counties. Dr. McClave then explained that, after making his calculations, "the overbuilt factor indicate[d] lower prices [in his model] *in counties where the overbuilding factor [was] present.*" (App. at 3422 (McClave Dec.) (emphasis added).) Thus, Dr. McClave's model assumes that elevated prices from reduced overbuilding could be present only in the five counties "that

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ogy "overbuilding screen," the District Court did indeed describe the concept to which I have given that label. *See Behrend*, 264 F.R.D. at 182 ("Once a county qualified as a benchmark for a particular year by satisfying [the DBS penetration and market share screens], it was examined to determine whether or not it had been significantly overbuilt."). Whether one uses the "screen" terminology is not what is important. Dr. McClave, in fact, does not describe any of the benchmarking criteria as "screens," which is a term that appears to have been only later applied to his methods.

Regardless of the terminology, the fact remains that Dr. McClave did screen for overbuilding in an attempt to account for elevated prices resulting from reduced overbuilding. Thus, that screen cannot be ignored in any "rigorous analysis," *Hydrogen Peroxide*, 552 F.3d at 318, of whether damages resulting from reduced overbuilding can be proven by common evidence.

RCN indicated it planned to enter," and the model did, in fact, identify elevated prices from reduced overbuilding only in those counties. (App. at 3412, 22 (McClave Dec.).) For the remaining counties, while there may be some uncertainty as to what exactly caused any elevated prices, this much is certain: the elevated prices identified by Dr. McClave in those thirteen counties were, according to Dr. McClave himself, the result of something other than reduced overbuilding. Consequently, any "damages" identified by Dr. McClave with respect to those thirteen counties are "uncertain damages . . . [that] are not the certain result of [reduced overbuilding]," and "may be substantially attributable to lawful competition." *Coleman* Motor, 525 F.2d at 1353 (quoting *Story Parchment*, 282 U.S. at 562).

Because Plaintiffs have been limited by the District Court to an overbuilding theory of antitrust impact, any price elevation resulting from a source other than reduced overbuilding is simply irrelevant. Thus, not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show, for thirteen counties in the Philadelphia DMA, that damages can be proven using any evidence whatsoever – common or otherwise. Perhaps, in those other counties, there is a way to show damages resulting from reduced overbuilding, but, if so, Plaintiffs have not identified it. As the burden lies with Plaintiffs to establish predominance, that alone should compel us to vacate the District Court's certification order with respect to class-wide proof of damages.[23]

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[23] The Majority states that, in criticizing Dr. McClave's model for identifying overbuilding damages in only five counties, I

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2. The DBS Penetration Screen

Dr. McClave screened for counties where DBS penetration was at or above the national average because "DBS . . . penetration was allegedly constrained by the anticompetitive behavior of Comcast." (App. at 3410 (McClave Dec.).) Using that screen would have been appropriate if, as Plaintiffs originally argued and as Dr. McClave was originally informed, DBS penetration had been constrained by Comcast's anticompetitive conduct. But, as the District Court explicitly held, Plaintiffs failed to tie "Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration." *Behrend*, 264 F.R.D. at 165. Consequently, there is no evidence in the record suggesting that DBS penetration in the Philadelphia DMA was in any way affected by Comcast's allegedly anticompetitive conduct. Rather, the District Court found that, while DBS penetration in

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have "misse[d] the central theory of Plaintiffs' case: by deterring the entry of overbuilders through clustering, Comcast allegedly maintained higher prices across the entire market area." (Slip Op. at 50-51 n.15.) This misperceives my reasoning. I understand Plaintiffs' theory but have pointed out that the theory, as altered by the District Court's ruling, no longer matches Dr. McClave's opinion. More precisely, Plaintiffs' claim is that by reducing overbuilding "Comcast allegedly maintained higher prices across the entire market area," (*id.*) whereas Dr. McClave attempts to show that, by reducing overbuilding, Comcast maintained higher prices in only the "five counties that RCN indicated it planned to enter as an overbuilder," (App. at 3412 (McClave Dec.)). The Majority notes that this particular problem with Dr. McClave's damages theory was not identified by Comcast, but we ought note overlook significant problems with the class certification simply because they are ones we have identified rather than ones to which our attention has been directed.

Philadelphia was well below the national average, the cause of that reduced penetration – Comcast's refusal to distribute Comcast SportsNet through DBS providers – "occurred prior to the class period," is "unrelated to clustering," is "based upon valid business considerations" and is "specifically permitted" by the FCC. *Id.*

Therefore, while DBS penetration in the Philadelphia DMA is below the national average, the cause of that reduced rate predated and is unrelated to Comcast's clustering and, thus, even in the absence of Comcast's allegedly anticompetitive conduct, DBS penetration in the Philadelphia DMA would be no different than the below average rate that has actually prevailed. As a result, any benchmark county used to identify "but for" conditions should use the actual DBS penetration rate from the Philadelphia DMA. Dr. McClave, nonetheless, used the much higher national average rate,[24] which identified benchmark counties in which cable prices were lower than in counties having DBS penetration similar to that in the Philadelphia DMA.[25] Because Dr. McClave then calculated damages by comparing prices in those benchmark counties (with national average DBS penetration and, therefore, lower prices) to actual prices in the Philadelphia counties (with below national average DBS penetration and, there-

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[24] According to Dr. McClave, national average DBS penetration during the six year period for which he calculated damages averaged 24.17%, whereas actual DBS penetration in the Philadelphia DMA averaged 12.77%. (App. at 3411 (McClave Dec.).)

[25] The District Court discussed extensively the evidence that "DBS competition constrains cable prices." *Behrend*, 264 F.R.D. at 163-65.

fore, higher prices), at least a portion of Dr. McClave's damages calculation results from the Philadelphia DMA having below national average DBS penetration. Since the cause of the below national average DBS penetration in the Philadelphia DMA is "unrelated to clustering," is "based upon valid business considerations," and is "specifically permitted" by the FCC, *id.*, that reduced DBS penetration is the result of lawful competition, and, it follows, "[t]he damage figures advanced by [Dr. McClave] may be substantially attributable to lawful competition." *Coleman Motor*, 525 F.2d at 1353.

The Majority responds to this flaw only by stating that the DBS penetration screen was "included to estimate typical competitive market conditions, not to calculate liability for the foreclosure of DBS competitors." (Slip Op. at 49.) That explanation misses the mark. In identifying benchmark counties for use in a damages analysis, the goal is not to identify "typical competitive market conditions." The goal is, and must be, to identify the conditions that would have existed "but for" Comcast's alleged anticompetitive conduct. In this case, even in the "but for" hypothetical world, the Philadelphia DMA would not have been typically competitive. Rather, given the District Court's findings, there is no question that, as a result of Comcast's *lawful* competition, DBS penetration in the Philadelphia DMA would have been well below that present in a typical competitive market. Thus, by comparing Philadelphia to benchmark counties having the much higher national average DBS penetration, Dr. McClave's model wrongly "calculate[s] liability for the foreclosure of DBS competitors," (*id.*) imposing damages based on the prices that would have prevailed had Comcast not lawfully foreclosed DBS competition.

3. The Market Share Screen

Dr. McClave screened for counties where Comcast's market share was "less than 40%," because that figure represented the midpoint between Comcast's 20 percent share before the class period and its 60 percent share during the class period and so identified "markets where Comcast is likely to have less market power than it has acquired in the Philadelphia market." (App. at 3410 (McClave Dec.).) Under Plaintiffs last viable theory of antitrust impact, however, while Comcast's market share is relevant to the question of whether there has been any reduction in overbuilding, it is not relevant – at least not in isolation – to determining the damages caused by that reduction. Instead, the relevant market share is the share that would have been held by any incumbent in the "but for" hypothetical world.

As an illustration of that point, consider a hypothetical county with two equally sized franchise areas. Assume that, prior to the class period, Comcast had a 100 percent share of one franchise area and that AT&T had a 100 percent share of the other, so that each had a 50 percent share of the county as a whole. Assume further that, as part of its clustering efforts, Comcast acquired AT&T's franchise area so that, today, Comcast has a 100 percent share of the entire county. To test the theory that clustering reduces overbuilding, a comparison between Comcast's current 100 percent share of the county and the 50 percent share that Comcast would have had but for its clustering would surely be relevant in determining whether clustering effected any reduction in overbuilding.

Next, assume that, after making that comparison, Plaintiffs could show that, had no clustering

taken place, RCN would have overbuilt 20 percent of each of the two franchise areas, so that, in the "but for" world, RCN would have a 20 percent share in each franchise area, and Comcast and AT&T would each have an 80 percent share in their respective franchise area. Pursuant to Plaintiffs' only theory – that increased overbuilding decreases prices – any damages in that scenario arise solely from the difference between RCN's 20 percent share in the "but for" franchise areas and RCN's zero percent shares in the current franchise areas. The damages resulting from that foregone overbuilding are the same whether, in the "but for" world, the remaining 80 percent of the franchise in question would have been controlled by Comcast or by AT&T. It follows, therefore, that once the antitrust impact of Comcast's clustering – i.e., the reduction in overbuilding – has been identified and accounted for as part of an overbuilding screen, any market share screen applied to isolate the "but for" conditions that would have prevailed in the Philadelphia DMA should screen not just for Comcast's share, but for the share of whatever incumbent would have been present but for the clustering.[26]

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[26] Again, this is not to say that Comcast's market share, in particular, will never be relevant. As just discussed, it is highly relevant for determining antitrust impact. Moreover, it might have been relevant to damages had the District Court not excluded three of Plaintiffs' theories of antitrust impact. In fact, the market share screen appears to be another relic of the Plaintiffs' having initially presented four theories of impact. One of those theories was that Comcast's increased market share increased its bargaining power and allowed it to reduce prices, *Behrend*, 264 F.R.D. at 178-81, and a second was that Comcast's increased market share reduced the ability of consumers to engage in benchmark pricing by comparing Comcast's prices to the prices of other cable providers in the region,

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Because Dr. McClave's model already assumes that there has been a reduction in overbuilding and screens for it, the relevant market share for damages purposes is the share of the market maintained by any incumbent – regardless of the identity of the particular incumbent. By calculating the appropriate market share screen using only Comcast's average share throughout the Philadelphia DMA, Dr. McClave has ignored any market share that, in the "but for" hypothetical world, would have been maintained by an incumbent other than Comcast. For franchise areas where Comcast was not present prior to the class period, Dr. McClave should have calculated damages by comparing Comcast's current share to the "but for" share that would have been held by any incumbents Comcast replaced. Because he instead effectively calculated damages by comparing Comcast's current share to Comcast's zero percent share prior to the class period,[27] he unfairly

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id. at 175-78. Had either of those theories survived the class certification process, it might have made sense for Dr. McClave to screen for Comcast's market share, because, under those theories, Comcast's market share directly impacted price. But the District Court rejected those theories, allowing Comcast to proceed only on a theory that clustering reduced overbuilding. Under that theory, what is relevant is the market share of all incumbent cable providers vis-a-vis overbuilders.

[27] I say he "effectively calculated damages" that way because Dr. McClave did not actually make a franchise by franchise comparison, which, as discussed *infra* Part II(B), is itself problematic. He instead calculated Comcast's market share by averaging its share throughout the Philadelphia DMA. But, because he included in that average Comcast's zero percent share in the franchises in which it had not been present prior to the class period, instead of including the share held by the incum-

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suppressed the relevant incumbent share and artificially inflated the damages calculation.

Because none of Dr. McClave's screens reflect the conditions that would have prevailed in the Philadelphia DMA "but for" any reduction in overbuilding, the damages Dr. McClave calculated are "not the certain result of the wrong," *Story Parchment*, 282 U.S. at 562. Accordingly, Dr. McClave's opinion cannot help a jury determine damages, and so would be inadmissible at trial for lacking fit. Because Dr. McClave's opinion is the only evidence Plaintiffs have offered to meet their burden of showing that damages can be proven using evidence common to the class, I would vacate the District Court's class certification with respect to class-wide proof of damages.[28]

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bent Comcast replaced, it is fair to say that he effectively calculated damages by comparing Comcast's actual share in those franchise areas to Comcast's zero percent share prior to the class period.

[28] The Majority suggests that any problems with Dr. McClave's screens are "attacks on the merits of the methodology that have no place in the class certification inquiry," because, "[e]ven if we were to overrule as clearly erroneous the District Court's findings on all four contested pieces of Dr. McClave's methodology – i.e., modify both of Dr. McClave's screens . . . only the final amount of estimated damages would change." (Slip Op. at 52.) I disagree. First, the problems I have identified with Dr. McClave's screens call into question not only the amount of damages but also whether there are any means of proving damages at all in thirteen of the eighteen Philadelphia DMA counties. *See supra* Part II(A)(1). Second, if Dr. McClave's model does not presently constitute a relevant means of calculating class-wide damages, to say that the model might be fixed, for example by "modify[ing] both of Dr. McClave's screens," (Slip Op. at 52), is no better than saying

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B. Damages Are Not Capable of Being Proven By Evidence Common to the Entire Class

While my thoughts thus far have focused on why Plaintiffs have not met their burden of showing that damages can be proven using evidence common to the class, none of the problems I have noted are necessarily irreparable. That is, Dr. McClave could conceivably redesign his model to address overbuilding throughout the Philadelphia DMA, to use actual DBS penetration rates, and to screen for the market share of all incumbents, not just Comcast. Nevertheless, there remains an intractable problem with any model purporting to calculate damages for all class members collectively.

Central to Dr. McClave's damages model is the conclusion that the price of cable television service in any given franchise area is affected by the relative market shares of at least three entities: overbuilders, DBS providers, and incumbent cable providers. All else being equal, for example, areas that are

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that Plaintiffs have made "a threshold showing" of predominance or shown a sufficient "intention to try the case in a manner that satisfies the predominance requirement" – both of which are insufficient under *Hydrogen Peroxide*, 552 F.3d at 321 (internal quotation marks omitted). Plaintiffs have the burden of establishing predominance and, until they have actually proffered a model that shows how damages can be calculated on a class-wide basis, they have not met that burden – particularly when the only evidence they have offered should be entirely inadmissible. The Majority's willingness to overlook the debilitating flaws in Dr. McClave's model in an effort to avoid an "attack on the merits," is precisely the kind talismanic invocation of "concern for merits-avoidance" that *Hydrogen Peroxide* forbids. *Id.* at 317 n.17.

overbuilt will have lower prices than areas that are not overbuilt, and areas with high DBS penetration will have lower prices than areas with low DBS penetration. For that reason, Dr. McClave's model identifies benchmark counties by screening for the relative market shares of those three entities.[29] While I do not accept the manner in which Dr. McClave has measured the relative shares of those entities in the "but for" Philadelphia DMA, I accept the premise that the relative shares have significant influence on the price of cable television service.

If price does vary with the changes in relative share within a franchise area, however, it is hard to see how those 650 franchise areas[30] can simply be treated as average for purposes of proving damages. The record indicates that, on the contrary, the "but for" market shares of overbuilders, DBS providers, and incumbent providers would vary, sometimes significantly, from franchise area to franchise area.

Addressing overbuilding first, RCN – the only party licensed to overbuild any part of the Philadelphia DMA – was licensed to overbuild in only five counties. (App. at 3640 (Williams Dec.); App. at 4284-85 (Singer Reply Dec.).) While Plaintiffs' experts have opined that, had RCN successfully overbuilt those five counties, it would have continued overbuilding elsewhere, (App. at 4284-85 (Singer Re-

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29 Or, at least, he screens for overbuilders, DBS providers, and a single incumbent provider – Comcast. I have already identified, *supra* Part II(A)(3), why he should instead screen for incumbent share.

30 Dr. Besen, one of Comcast's experts, reports that there are 649 unique franchise areas in the Philadelphia DMA. (App. at 3782 (Besen Reply Dec.).)

ply Dec.)), any overbuilding into the other parts of the Philadelphia DMA would, it seems clear, have come later than the overbuilding of the five licensed counties. Thus, while some franchise areas might have been overbuilt early in the class period, other franchise areas would likely never have been overbuilt at all or have been overbuilt only later in the class period. There might, for instance, in the "but for" world be some franchise areas that were 50 percent overbuilt for the entire class period and other franchise areas that were only 5 percent overbuilt and only for a single year, or perhaps not overbuilt at all. That means that, both throughout the Philadelphia DMA and throughout the class period, there would probably be very significant variation in the "but for" level of overbuilding from franchise area to franchise area.

Consider next DBS penetration. Dr. McClave testified that the DBS penetration rate he used for the Philadelphia DMA was an average for the DMA, but he also said that it was his understanding that "DBS penetration varies across the cluster here" and that it was "possible that some of the counties in the Philadelphia DMA in fact have penetration that's above the national median." (App. at 729-30 (McClave Cross).) Thus, according to Dr. McClave, not only does DBS penetration vary across the Philadelphia DMA, but the variation is pronounced enough that some parts of the Philadelphia DMA have above national average DBS penetration despite the fact that the Philadelphia DMA, as a whole, has DBS penetration at only half the national average. Because DBS penetration was unaffected by Comcast's alleged anti-competitive conduct, *see supra* Part II(A)(2), DBS penetration in the "but for" Phila-

delphia DMA would likewise vary significantly from one franchise area to another.

Finally, with respect to the incumbents' market share, the record gives little information regarding what the share of any non-Comcast incumbent would be in the "but for" world. We do know, though, that Comcast's share prior to clustering varied markedly from franchise area to franchise area. (*See, e.g.*, App. at 3833 (Chipty Dec.) (stating that Comcast "had a zero percent share of housing units in the majority of counties" and, therefore, that "Comcast's share in the counties in which it was present was substantially higher than [its average market share]"); App. at 733 (McClave Cross) (testifying that, at the beginning of the class period, Comcast was present in "maybe half, maybe less of the counties" and that its share "in the counties where [it was] present" was probably higher than its average share)). And, where the other two components of market share – DBS penetration and overbuilding[31] – vary from one franchise area to another, it becomes a near mathematical certainty that the remaining portion of the franchise held by incumbent cable providers must likewise vary.[32]

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[31] While there may be other "alternative delivery systems" that have a limited share of the market, Dr. McClave includes those providers in his DBS penetration screen, *see supra* note 21, and they are, therefore, accounted for.

[32] It is possible, of course, that the variation in DBS and overbuilder shares could be such that the combined total of the two is the same in different franchise areas, and, therefore, it is not a true mathematical certainty that incumbent share must also vary. That that would occur across the 650 franchise areas, however, seems implausible in the extreme.

The wide variation in the relative market shares evidenced by the record makes it hard to imagine a means of calculating class-wide damages. Even if Dr. McClave's benchmarks were not problematic, to say that Comcast's "but for" share of the market throughout the Philadelphia DMA would be, on average, 40% is about as meaningful as saying that "with one foot on fire and the other on ice, I am, on average, comfortable."[33] Given that the three major factors identified as influencing price – overbuilding, DBS penetration, and incumbent share – vary widely within the franchise areas across the DMA, and given further that Comcast prices its cable service at the franchise level, (*see* App. at 716), I have difficulty accepting that it is appropriate to ignore those differences and take an average across the counties of the DMA.[34]

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[33] Sometimes attributed to Mark Twain, the actual source of this quote is unknown.

[34] The Majority asserts that "concern over using mathematical averages across the Philadelphia DMA . . . is notably absent from Comcast's briefing . . . ." (Slip Op. at 53-54 n.18.) But it is not absent. In fact, Comcast criticizes Dr. McClave's screens by explaining that:

> prior to the Transactions[,] Comcast did not operate in the majority of franchise areas in the DMA. By contrast, in the franchise areas where Comcast *did* operate, it is undisputed that Comcast's market share was significantly ***higher*** than 40%. Thus, the pre-class "20%" market share Dr. McClave employed in the creation of his screen is a mirage, arrived at solely through the artifice of averaging Comcast's greater-than-40% share of markets where it did operate with its "0% share" in hundreds of markets where it was not even present.

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This primary flaw in Dr. McClave's methodology – using a single set of assumptions for the entire Philadelphia DMA – cannot be fixed merely by altering his model. It seems to me that no model can calculate class-wide damages because any damages – such as they may be – are not distributed on anything like a similar basis throughout the DMA.[35]

[Footnote continued from previous page]

(Appellants Br. at 43.) That criticism precisely mirrors my own. Because of the significant variation in the market makeup from franchise area to franchise area, DMA-wide averages are not reliable. *See also infra* n.35.

35 This is not simply a case where there might be some variation in the amount of damages from one class member to another that can be ignored in order to gain the benefit of class treatment. Instead, due to the wide variations in the market makeup of the franchise areas across the DMA, proving damages will require some factual inquiry into the relative market shares of overbuilders, DBS providers, and incumbents in individual franchise areas (or perhaps, as subsequently noted in this dissent, groups of franchise areas). The Majority, quoting Wright's Federal Practice and Procedure, suggests that those differences in damages should not affect the certification process because "'it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate.'" (Slip. Op. at 45-46 (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1781 (3d ed. 2005)).) I agree with the quoted statement, but would point also to the following quote from the same treatise: "Rather, the question of damages can be severed from that of liability and tried on an individual basis." *Id.* Thus, neither Wright – nor any authority I can find – suggests that where there are wide differences in damages from one class member to another, those differences can be ignored. Wright suggests instead that those differences can be accounted for by considering liability on a class-wide basis but damages on a more individualized basis – consistent with what I propose.

Rather, where some class members might reside in a franchise area that would have been 50 percent overbuilt for the entire class period and other class members might reside in a franchise area that would have been only 5 percent overbuilt and only for a single year, or not overbuilt at all, it strains credulity to believe that the damages suffered by those individuals would all be the same as a result of reduced overbuilding. Yet Dr. McClave's model treats them as though they are the same,[36] as would any model attempting to calculate damages on an average class-wide basis.

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36 I recognize that Dr. McClave's model does not treat all franchise areas exactly the same, because he uses actual prices on a county-by-county level and, as a result, calculates a separate "but for" price for each county. (App. at 3424-26 (McClave Dec.).) But, while he uses actual prices on a county-by-county level, he calculates the "but for" prices using the same benchmark counties for the entire Philadelphia DMA (again, excepting Lehigh and Northampton, where Comcast has no presence). He treats the DMA as though the "but for" conditions would have been the same throughout.

The Majority states that this criticism "overstates the degree of dissimilarity among the franchise areas" because I fail to note that "[m]any franchise areas within counties often have identical or nearly identical pricing." (Slip Op. at 54 n.18 (quoting App. 3409 (McClave Dec.).) It may well be that there are similarities allowing for grouping of franchise areas, as I note in suggesting the possibility of subclasses. More fundamentally, however, the problem with Dr. McClave's opinion is not that it fails to account for variations in actual prices in the Philadelphia DMA, but that it fails to account for variations in the "but for" conditions that would have existed within the Philadelphia DMA. By so doing, the model is unable to distinguish between persons living in areas that may have been highly overbuilt and who, thus, would have suffered substantial damages, and persons living in areas that may never have been overbuilt and who, thus, would have suffered no damages.

The variation in conditions within the nearly 650 franchise areas in the Philadelphia DMA means that the issue of damages is more fractured than a single class can accommodate. I do not suggest that there necessarily would need to be 650 subclasses. It may well be that subclasses could be created encompassing groups of multiple franchise areas having similar demographics. *See, e.g., Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 566 (2d Cir. 1968) (explaining that where "differences among the class members bear only on the computation of damages," it "can be adequately handled . . . [by] divid[ing] the class into appropriate subclasses"). Whether that would necessitate the creation of so many subclasses as to defeat the benefit of class treatment is something I do not venture to conclude on this record. But I would remand the case to the District Court for consideration of the feasibility of subclasses.

III. Conclusion

For the foregoing reasons, I would vacate the District Court's certification order to the extent it provides for a single class as to proof of damages and remand the case for the District Court to address whether Dr. McClave's model could, in fairness, be revised to accurately reflect the conditions that would have existed in the Philadelphia DMA in the absence of any reduction in overbuilding caused by clustering. I would further ask the District Court to consider whether the class certified for proving antitrust impact can be divided into appropriate subclasses for purposes of proving damages.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLINE BEHREND, et al.	:	CIVIL ACTION
v.	:	
COMCAST CORPORATION, et al.	:	NO. 03-6604

MEMORANDUM

Padova, J. **January 7, 2010**

I. INTRODUCTION

Presently before the Court in this antitrust suit alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, is the Plaintiffs' Amended Motion for Class Certification. On May 3, 2007, the Court granted a motion to certify the class. However, following the decision of the United States Court of Appeals for the Third Circuit in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) ("*Hydrogen Peroxide*"), we granted Comcast's motion to reconsider the certification decision and the putative Class ("the Class") filed the pending Amended Motion.

The only certification issue that remains in dispute is the requirement of Fed. R. Civ. P. 23(b)(2) that common issues of law and fact predominate.[1]

[1] In our May 23, 2007 certification decision, we determined that the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy had been satisfied by the Class. We

[Footnote continued on next page]

To support its certification arguments, the Class has propounded the expert reports of Dr. Michael Williams[2] and Dr. Hal Singer.[3] Its damages expert, Dr. James McClave, has also submitted reports to show class-wide damages.[4] Comcast has responded with the expert reports of Dr. Tasneem Chipty[5] and Dr.

[Footnote continued from previous page]
also determined that the Class had satisfied the Rule 23(b)(3) requirement of superiority. Comcast does not contest these determinations, which we incorporate by reference.

[2] Dr. Williams is the director of ERS Group, an economic and financial consulting firm specializing in complex business litigation and regulation. He holds a Ph.D. in economics from the University of Chicago and was previously employed as an economist with the Antitrust Division of the Justice Department. (Expert Decl. of Michael Williams, Ph.D. ¶ 1 ("Williams Decl.").)

[3] Dr. Singer is President of Empiris LLC, an economic consulting firm. He holds a Ph.D. in economics from Johns Hopkins University. His economic expertise is antitrust, industrial organization and regulation. (Class Cert. Decl. of Dr. Hal Singer ¶ 6 ("Singer Class Cert. Decl."). He has worked as an economist for the U.S. Securities and Exchange Commission and the Army Corps of Engineers, as well as for private economic consulting firms, and has taught microeconomics and international trade at the undergraduate level. (*Id.* ¶ 8.)

[4] Dr. McClave has a Ph.D. in statistics and has taught at the university level for 20 years. He is an expert in the field of econometrics, which is the application of statistical and mathematical methods to economic issues. He is currently the President and CEO of Info Tech, Inc., which provides consulting and software development services associated with antitrust analysis. (Corrected Expert Decl. of Dr. James T. McClave at 1-2 ("McClave Decl.").)

[5] Dr. Chipty is Vice President of CRA International, an economic and business consulting firm. She specializes in economics and industrial organization. She holds a Ph.D. in economics from the Massachusetts Institute of Technology. She has

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David J. Teece.[6] The experts' opinions raise substantial issues of fact and credibility that we are required to resolve to decide the pending motion. *See Peroxide*, 552 F.3d at 316 (stating that the requirements of Rule 23 are not merely "pleading rules" and an "overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met"). Having rigorously analyzed the expert reports, as well as the testimony presented by the parties during a four-day evidentiary hearing, we conclude that the Class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis.

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taught at MIT, The Ohio State University, and Brandeis University and served as a consultant to the Department of Justice and the Federal Communications Commission. (Decl. of Dr. Tasneem Chipty in Reply to Plaintiffs' Amended Motion to Certify the Philadelphia Cluster Class at 1 ("Chipty Decl.").)

[6] Dr. Teece holds a Ph.D. in economics from the University of Pennsylvania. He is the Tusher Professor of Global Business and Director of the Institute for Management, Innovation and Organization at the University of California at Berkley. He has also taught at Stanford University and Oxford University. He is also Director and Vice Chairman of LECG, LLC, an expert services firm specializing in the application of economic and financial analysis to legal and policy issues. (Expert Report of David J. Teece, Ph.D. at 6 ("Teece Report").)

II. STANDARD OF REVIEW

A. Class Certification

In order to obtain class certification, a party must satisfy the four prerequisites of Rule 23(a) and show that the action can be maintained under at least one of the provisions of Rule 23(b).[7] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). The Class in this case seeks certification under Rule 23(b)(3), which provides that certification is permissible if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The twin requirements of Rule 23(b)(3) are referred to as the predominance and superiority requirements. Comcast concedes that the Class satisfied the Rule 23(a) prerequisites and the Rule 23(b)(3) superiority requirement; the sole remaining issue is whether it satisfies the predominance requirement of Rule 23(b)(3).

Class certification is only appropriate "if the trial court is satisfied, after a rigorous analysis," that each requirement of Rule 23 has been met. *Gen Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). "Class certification is an especially serious decision, as it 'is of-

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[7] Rule 23(a) provides that class certification is permissible only if "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

ten the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).'" *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)).

The United States Court of Appeals for the Third Circuit has recently clarified what is meant by "rigorous analysis." Rigorous analysis requires "'a thorough examination of the factual and legal allegations,'" *Hydrogen Peroxide*, 552 F.3d at 316 (quoting *Newton*, 259 F.3d at 167), and the resolution of all legal or factual disputes relevant to Rule 23 by a preponderance of the evidence to "make findings that each Rule 23 requirement is met or is not met," *id.* at 320. In other words, we must find, based on "all relevant evidence and arguments presented by the parties," that "the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *Id.* The district court's findings, while conclusive with respect to class certification, do not bind the fact-finder on the merits. *Id.*; *see also In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("*In re IPO*"); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 323 (5th Cir. 2005).

Although a district court inquires into the merits of the case insofar as "arguments that go to the merits of a plaintiff's cause of action . . . also implicate the class certification decision," *Jackson v. Se. Pa. Transp. Auth.*, 260 F.R.D. 168, 184 (E.D. Pa. 2009), such an inquiry is merely preliminary. *Hydrogen*

Peroxide, 552 F.3d at 317. A plaintiff need not establish by a preponderance of the evidence the merits of its claims at the class certification stage, and any inquiry into the merits that is not necessary to a Rule 23 decision is precluded. *Jackson*, 260 F.R.D. at 184 (citing *Newton*, 259 F.3d at 166-67, and *Hydrogen Peroxide*, 552 F.3d at 317-18). However, the movant must do more than "assur[e] . . . the court that it intends or plans to meet the requirements" of Rule 23. *Hydrogen Peroxide*, 552 F.3d at 318; *see also Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179, 186 (3d Cir. 2006) (holding that there must be "full and clear articulation of the litigation's contours at the time of class certification").

As with other matters relating to Rule 23 requirements, "[e]xpert opinion . . . calls for rigorous analysis." *Hydrogen Peroxide*, 552 F.3d at 323, 325 ("Rule 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties."). A district court must not uncritically accept expert opinion testimony "as establishing a Rule 23 requirement merely because [it] holds the testimony should not be excluded, under Daubert or any reason." *Id.* at 323. Performing a rigorous analysis may require the district court to weigh conflicting expert testimony at the certification stage and determine whether an expert's opinion is persuasive or unpersuasive. *Id.* at 323, 324 (noting that "a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement, but it may not decline to resolve a genuine legal or factual dispute" relevant to class certification); *see also In re IPO*, 471 F.3d at 42 (disavowing an earlier holding "that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed");

Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005). The court must resolve expert disputes to the extent necessary to determine whether a Rule 23 requirement has been satisfied even if the dispute implicates the credibility of one or more experts. *Id.* at 324.

B. Rule 23(b)(3) Predominance Requirement

Predominance requires that "'[i]ssues common to the class must predominate over individual issues.'" *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 313-14 (3d Cir. 1998)). The district court must "consider whether plaintiff's legal claim, if plausible in theory, 'is also susceptible to proof at trial through available evidence common to the class.'" *Jackson*, 260 F.R.D. at 184 (quoting *Hydrogen Peroxide*, 552 F.3d at 325). The district court's analysis of predominance "is especially dependent upon the merits of a plaintiff's claim," *Constar*, 2009 WL 3462032 at *3, since "the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual." *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *Blades*, 400 F.3d at 566). Accordingly, "'a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.'" *Id.* (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008)).

Notwithstanding the Supreme Court's observation that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws," *Amchem*, 521 U.S. at 625, the district court should not "relax its certification analysis, or presume a requirement for certifi-

cation is met, merely because a plaintiff's claims fall within one of those substantive categories." *Hydrogen Peroxide*, 552 F.3d at 322. Therefore, "the court should not suppress 'doubt' as to whether a Rule 23 requirement is met – no matter the area of substantive law. *Id.* "'If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id.* at 311 (quoting *Newton*, 259 F.3d at 172).

To prevail on its antitrust claim, the Class must prove the following elements: (1) violation of § 1 of the Sherman Act; (2) individual injury or impact resulting from that violation; and (3) measurable damages. *Hydrogen Peroxide*, 552 F.3d at 311. At the class certification stage, the Class must establish that common proof will predominate with respect to each of these elements. *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 141 (D.N.J. 2002). With respect to antitrust impact, the Court of Appeals for the Third Circuit has explained:

> Individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certifica-

> tion is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial.

Hydrogen Peroxide, 552 F.3d at 311-12 (citations omitted).

III. COMMON EVIDENCE OF ANTITRUST IMPACT

The Class asserts that it can establish its antitrust claims through the following common evidence of antitrust impact applicable to all class members:

- Comcast's swaps and transactions in the relevant geographic market,[8] the Philadelphia

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[8] The swaps and acquisitions include the following actions taken by Comcast:

- The April 1998 acquisition of Marcus Cable and its 27,000 cable subscribers located in Harrington, Delaware, which is part of the Philadelphia DMA.
- The June 1999 acquisition of Greater Philadelphia Cablevision, Inc., a subsidiary of Greater Media, Inc., and its 79,000 cable subscribers located in Philadelphia.
- The January 2000 acquisition of Lenfest Communications, Inc. and more than 1.1 million cable subscribers located in Berks, Bucks, Chester, Delaware, and Montgomery counties in Pennsylvania, and New Castle County in Delaware.
- The January 2000 acquisition of Lenfest's ownership interests in Garden State Cablevision L.P. and its 212,000 customers located in Atlantic, Burlington, Camden, Cape May,

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designated marketing area ("DMA"), eliminated competition, resulting in increased prices for expanded basic cable subscribers;

- Comcast's clustering of the Philadelphia DMA led to higher expanded basic cable rates throughout the DMA, affecting all class members;
- Comcast's clustering strategy made it profitable for Comcast to deny access to its regional

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Cumberland, Gloucester, Mercer, and Salem counties in New Jersey, which is part of the Philadelphia DMA.

- The December 2000 swap agreement with AT&T, wherein Comcast obtained cable systems and approximately 770,000 subscribers, including subscribers located in Eastern Pennsylvania (Berks and Bucks counties) and New Jersey. In exchange, AT&T obtained cable systems and approximately 700,000 Comcast subscribers located in Chicago and elsewhere around the country.
- The January 2001 swap agreement with Adelphia Communications Corp., wherein Comcast obtained cable systems and approximately 464,000 subscribers located primarily in the Philadelphia area and adjacent New Jersey areas. In exchange, Adelphia received Comcast's cable systems and subscribers located in Palm Beach, Florida and Los Angeles, California.
- The April 2001 swap agreement with AT&T, wherein Comcast obtained cable systems and approximately 595,000 subscribers, including subscribers located in Pennsylvania and New Jersey.
- The August 2006 swap agreement with Time Warner in connection with the Adelphia bankruptcy, wherein Comcast obtained cable systems and approximately 41,000 subscribers in the Philadelphia DMA.
- The August 2007 acquisition of Patriot Media and its 81,000 cable subscribers located in New Jersey, within the Philadelphia DMA.

sports programming content, Comcast SportsNet Philadelphia ("CSN Philadelphia"), to DirecTV and EchoStar, its direct broadcast satellite ("DBS") competitors, resulting in decreased DBS penetration in the Philadelphia DMA, which led to increased expanded basic cable prices to all class members;

- Comcast's clustering has impaired the ability of overbuilders (rival wireline providers of multichannel video programming service), such as competitor RCN, to effectively compete in the Philadelphia DMA, resulting in higher rates paid by all class members; and
- widely accepted common methodologies are available to measure and quantify damages on a class-wide basis.

(Mem. in Supp. of Pls' Am. Mot. for Cert. of the Philadelphia Class at 9; Williams Decl. ¶ 108.) Dr. Williams opines that the relevant product market is multichannel video programming services distributed by multichannel video programming distributors ("MVPDs"), including cable companies, local exchange carriers ("LECs")[9], and DBS providers. (Williams Decl. ¶ 22.) He states that the relevant geographic market is the Philadelphia DMA. (*Id.* ¶ 27.) Dr. Williams attempts to show that Comcast possesses market power in the relevant geographic market and product market by conducting a market structure analysis. He then conducts a market per-

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[9] LECs are traditional telephone companies such as Verizon, which offers its fiber optic video service in competition with Comcast's expanded basic cable service. They are also referred to by some of the experts as incumbent local exchange carriers or "ILECs".

formance analysis to determine the results of Comcast's attaining and maintaining its market power. In his market structure analysis, Dr. Williams examines the effects of the swaps and acquisitions on Comcast's market share, the level of market concentration in the Philadelphia DMA, and barriers to entry. (*Id.* ¶ 111.) In his market performance analysis, Dr. Williams examines Comcast's alleged ability to charge rates above those that would prevail in the absence of the alleged anticompetitive conduct. (*Id.* ¶ 126.)

A. The Geographic Market

Dr. Williams states seven bases to support his conclusion that the relevant geographic market is the Philadelphia DMA.

1. Denial of access to CSN Philadelphia is based on the Philadelphia DMA

Dr. Williams' first economic explanation for his geographic market description follows from his analysis of the effect of Comcast's denial of CSN Philadelphia to the DBS providers. Dr. Williams finds that Comcast had an economic incentive to deny CSN Philadelphia to the DBS providers because of the percentage of subscribers it maintained in the Philadelphia DMA. He reasons that if Comcast had a sufficiently small percentage of subscribers in the Philadelphia DMA, it would not be profitable for the company to deny access to the DBS providers because the loss in forgone revenue on sales of CSN Philadelphia to the DBS providers would be greater than the gain in revenue on sales of multichannel video programming service to the incremental number of subscribers who would have switched to DBS had Comcast not denied access to CSN Philadelphia. Dr. Williams finds that Comcast's increase in its per-

centage of subscribers in the Philadelphia DMA through swaps and acquisitions made it profitable for Comcast to deny DBS providers access to CSN Philadelphia. He also finds that econometric evidence shows that, all else equal, denying access to CSN Philadelphia reduced DBS penetration rates in the Philadelphia DMA, and that, all else equal, reductions in DBS penetration rates led to higher rates for expanded basic cable service throughout the Philadelphia DMA. (*Id.* ¶¶ 28-29.)

2. Effect of ownership by a large multisystem operator

Dr. Williams' second economic basis for his geographic market definition follows from his analysis of how a cable system's rates change, all else equal, when it is owned by a large multisystem operator ("MSO") or becomes part of a cluster. He states that econometric evidence shows that, all else equal, cable systems affiliated with a large MSO generally have higher rates than other cable systems. Williams contends that a number of the cable systems acquired or swapped by Comcast in the Philadelphia DMA were not affiliated with a large MSO prior to becoming affiliated with Comcast, which was a large MSO. (*Id.* ¶ 30.) He states that econometric evidence also shows that, all else equal, cable systems owned by an MSO that are located in a geographic "cluster" generally have higher rates than other cable systems. Comcast's swaps and acquisitions in the Philadelphia DMA created such a cluster. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. (*Id.*)

Comcast disputes this portion of Dr. Williams' opinion, arguing that it is not supported by fact. It asserts that large portions of the Philadelphia DMA were already controlled by clustered MSOs before the swaps and acquisitions. The class certification record demonstrates that large portions of the DMA were, in fact, already controlled by MSOs. For example, Comcast acquired substantial cable assets in the DMA through its purchase of Lenfest, itself a large, clustered MSO.[10] (Williams Reply Decl. fig.5.) Acquisitions and swaps from AT&T, Adelphia and Time Warner also brought systems into Comcast ownership that were previously part of large MSOs. *See* footnote 8, supra. This does not, however, im-

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[10] Williams conceded on cross-examination that Lenfest was already a substantial, clustered cable system before it was acquired by Comcast:

> Q But even prior to the Adelphia transaction or any of the other deals, Comcast and Lenfest (ph), closed in January of 2000, right?
> A That's correct.
> Q Comcast was a substantial cable cluster, at that time?
> A After the Lenfest acquisition?
> Q Before.
> A Sure, Comcast had substantial properties in the Philadelphia DMA before the Lenfest transaction.
> Q And Lenfest was a substantial cable cluster, at the time, right?
> A Lenfest had, yeah, they have approximately a million customers.
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> . . .
>
> Q So, Lenfest had 1.1 million subscribers that, even just standing alone today, Lenfest would be one of the largest cable clusters today?
> A They certainly are a large cable company, yes, sir.

(N.T. 10/15/09 at 37:13-25; 38:16-19.)

peach Dr. Williams' assertion that the end result of the swaps and acquisitions created an antitrust impact in the relevant geographic market. The fact that parts of the DMA were already clustered does not eliminate the possibility that creating an even larger cluster had anticompetitive effects. As Dr. Williams asserts in his market performance analysis, consolidating the Philadelphia cluster from the cable properties previously owned by these MSOs and other smaller cable companies permitted Comcast to charge supra-competitive prices for expanded basic cable service in the geographic market.

3. Overbuilders

The third explanation that Dr. Williams provides for his geographic market definition follows from his analysis of how a cable system's rates change, all else equal, when it faces competition from overbuilders. His economic analysis shows that Comcast's alleged anticompetitive conduct in the Philadelphia DMA reduced the extent of competition provided by overbuilders in the Philadelphia DMA. He states that econometric evidence shows that reductions in overbuilding cause cable rates to increase, all else equal. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. (Williams Decl. ¶ 31.)

4. Benchmark competition

Dr. Williams' fourth basis follows from an analysis of how "benchmark competition" affects cable rates. Benchmark competition occurs when competition in a market is enhanced by the actions of regulators, firms, and/or customers in comparing the performance of different companies. He opines that both cable regulators and cable customers rely on,

and cable companies engage in, benchmark competition. In his opinion, Comcast's swaps and acquisitions in the Philadelphia DMA reduced the degree of benchmark competition. Reductions in benchmark competition, all else equal, cause cable rates to increase. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. (*Id.* ¶ 32.)

5. Industry participants use DMAs

Fifth, Dr. Williams opines that industry participants characterize competition between MVPDs as occurring in DMAs. (*Id.* ¶ 33.)

6. Clustering

The sixth basis for Dr. Williams' conclusion follows from an economic analysis that demonstrates how swaps and acquisitions by an MSO that cause clustering can reduce overbuilding and lead to higher profits and higher rates. He opines that Comcast's swaps and acquisitions in the Philadelphia DMA created such a cluster. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. (*Id.* ¶ 34.)

7. Increased bargaining power

Finally, Dr. Williams bases his geographic market definition on an economic analysis that demonstrates how a cable provider's increasing the number of its cable systems or clustering its cable systems can increase its bargaining power and lead to higher profits and higher rates. He opines that Comcast's swaps and acquisitions in the Philadelphia DMA increased its number of cable systems and created such a cluster. Thus, Comcast's conduct led to rates being

increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. He opines that a hypothetical monopolist of MVPD services in the Philadelphia DMA would find it profitable to impose a small but significant and nontransitory increase in price ("SSNIP"). (*Id.* ¶ 35.)

Comcast's expert, Dr. Teece, disagrees with Dr. Williams' opinion that the Philadelphia DMA is the proper geographic market. Dr. Teece notes that the Third Amended Complaint defines the relevant geographic market as the Comcast Philadelphia cluster, not the Philadelphia DMA. (Teece Reply Decl. To Class Cert. ¶ 8 ("Teece Reply Decl.").) He goes further to propose that the relevant geographic market for expanded basic cable service is inherently local and may be as small as individual households because, in the MVPD industry, there is no demand-side substitutability between adjacent geographic areas. This is because consumers are extremely unlikely to move to a different franchise area because of higher cable prices or lower quality service. (*Id.* ¶ 9.) However, because it is impractical to define a market at the household level, Teece opines that the FCC calculates market share using franchise area.[11] (*Id.*)

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[11] In its decision approving the sale of Adelphia cable assets to Time Warner and Comcast, the FCC stated that "[c]onsistent with our precedent, we find that the relevant geographic unit for the analysis of competition in the retail distribution market is the household." (Ex. D27 ¶ 81.) Since cable companies generally operate in non-overlapping territories and do not compete with each other in the distribution markets they serve, the FCC determined that the transactions before it would not reduce the number of competitive alternatives available to the vast majority of households. *Id.* The FCC explained, however, that "because it would be administratively impractical and inefficient to

[Footnote continued on next page]

He concedes that the DMA level may be appropriate to assess regional sports programming, because interest in regional sports roughly approximates the DMA. However, he asserts, such issues are distinct from the allegations of the Third Amended Complaint. (*Id.* ¶ 11.)

According to Dr. Teece, six of Dr. Williams' seven economic bases for his market definition are nothing more than a restatement of the conduct that he claims is anticompetitive. (*Id.* at 16.) He opines that none of these bases provide an adequate explanation for asserting that the Philadelphia DMA is the proper geographic market because (1) there is substantial variation in the MVPD choices available to individual consumers in the Philadelphia DMA including DBS and FiOS; (2) there is substantial variation in MVPD subscriber shares across the DMA; and (3) variations in cable prices across local areas indicates variation in competitive conditions across the DMA. (*Id.* ¶¶ 19-29.)

We conclude that Dr. Williams' geographic market definition is susceptible to proof at trial through available evidence common to the class. Dr. Teece's focus on the individual household is not supported by the record. Setting the geographic market at a unit that small would be both impractical and inefficient. Thus, in its examination of cable markets, the FCC aggregates relevant geographic markets in which customers face similar competitive choices. The con-

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analyze a separate relevant geographic market for each individual customer," it aggregated relevant geographic markets in which customers face similar competitive choices." (*Id.* ¶ 81 n.282.)

duct at issue here centers on Comcast's attempt to acquire substantially all of the cable systems in the Philadelphia DMA. Because the record evidence shows that consumers throughout the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from Comcast's clustering conduct in the Philadelphia DMA, we find that it can be the appropriate geographic market definition.

B. Market Structure Analysis

In his market structure analysis, Dr. Williams concludes that Comcast's swaps and acquisitions in the Philadelphia DMA eliminated actual or potential competition in the relevant market. Through clustering, achieved via the swaps and acquisitions, Comcast increased its share of the relevant market, leading to higher rates throughout the Philadelphia DMA. Dr. Williams asserts that Comcast's clustering strategy made it profitable for it to deny DBS providers access to CSN Philadelphia, that the inability of DBS providers to offer CSN Philadelphia reduced their penetration rates in the Philadelphia DMA, and that the reduction in DBS penetration in the Philadelphia DMA caused increases in the rates for expanded basic cable service paid by Comcast's subscribers throughout the Philadelphia DMA. According to Dr. Williams, Comcast's clustering also created an antitrust barrier to the entry of competitors, including overbuilders, and reduced or eliminated benchmark competition, resulting in higher rates paid by Comcast's subscribers throughout the Philadelphia DMA. (Williams Decl. ¶ 108.) Williams suggests that this analysis shows that consumer harm was not limited to only those Comcast subscribers located in franchise areas in which over-

building was likely to occur but for the alleged anticompetitive conduct. Rather, he asserts that the alleged anticompetitive conduct resulted in higher rates for all Comcast subscribers throughout the Philadelphia DMA, and that Comcast's anticompetitive conduct injured all class members, because the swaps and acquisitions removed competitors, raised entry barriers, and enabled Comcast to acquire, maintain, and exercise monopoly power throughout the Philadelphia DMA. (*Id.* ¶¶ 109-10.)

Williams opines that, as a result of its swaps and acquisitions, Comcast was able to increase its market share in the Philadelphia DMA from 23.9% in 1998 to a high water mark of 77.8% in the second quarter of 2002, ending at 69.5% in 2007. As a result of Comcast's swaps and acquisitions, its Herfindahl-Hirschman Index ("HHI") increased from a value of 1,833 in 1998 to a range between 6,148 to 6,178 in the second quarter of 2002, ending in the range between 5,069 to 5,263 in 2007.[12]

Dr. Williams opines that there exist substantial antitrust barriers to entry into the relevant market because MVPD providers, both wire-based and satel-

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[12] The HHI is defined as the sum of the squares of the market shares of the firms in the relevant market. In a monopoly, there is only one firm with 100 percent market share, so the HHI equals 100x100 = 10,000. This is the largest value the HHI can attain. In a market with two equal-sized firms, HHI equals 50x50 + 50x50 = 5,000. If the two firms had shares of 80 percent and 20 percent, the HHI would equal 80x80 + 20x20 = 6,800, which is greater than the HHI with two equal-sized firms. As a general principle, for any given number of firms, the HHI is lowest when the firms are of equal size. In a market with hundreds of small firms, the HHI would be close to zero. (Williams Decl. at 29 n.57.)

lite, incur substantial sunk capital costs in building their networks and must spend significant resources on advertising. He reports that the FCC has determined that entry barriers may include: (1) strategic behavior by an incumbent designed to raise its rival's costs, (2) local and state level regulations which may cause new entrants to incur a delay in gaining access to local public rights-of-way facilities; and (3) technological limitations. (*Id.* ¶ 118.)

Finally, Dr. Williams concludes that the swaps and acquisitions allocated the geographic market because Comcast competed with cable companies that previously operated in the Philadelphia DMA for both (1) the award of original cable franchises and (2) the purchase of cable systems in the Philadelphia DMA. (*Id.* ¶ 121.)[13] He opines that the market allocations have diminished competition in the Philadelphia DMA and, because the market allocations were subject to the non-compete agreements, Comcast has the means, from an economic perspective, of enforcing the market allocations by contract, making reentry unlikely. (*Id.* ¶¶ 120-24.)

We accept in part and reject in part Dr. Williams' market structure analysis as proof of antitrust impact that can be shown by evidence common to the

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[13] Williams cites the following as examples of this competition: (1) AT&T and Comcast were competitors for the assets of Media One before the two competitors agreed to end the bidding process and enter into the agreement that resulted in Comcast acquiring Lenfest; (2) in 1995, Comcast considered Lenfest and Mediacom to be rival bidders for the Marcus' Eastern Shore Systems; and (3) in evaluating Cablevision systems in Ohio, Massachusetts, and Michigan, Comcast stated that bidders may include Charter, MediaOne, Adelphia, RCN, Time Warner, Charter, Insight, and Cox. (Williams Decl. ¶ 121.)

class. First, we reject his market allocation contention based upon the assertion that the acquired cable companies that previously operated in the Philadelphia DMA competed with Comcast for the award of original cable franchises. Dr. Williams' "elimination of competition in the award of initial franchises" theory is not relevant to a market structure analysis for this Class's claims because almost all of the original franchise bids occurred well before the commencement of the class period on December 1, 1999. (Teece Reply Decl. ¶ 148; Besen Decl. ¶¶ 24-25; N.T. 10/26/09 at 121:3-7.[14]) For example, the franchises in the City of Philadelphia were awarded in 1995. Once the franchises were awarded, which was prior to the class period, there was no further competition for these awards. Accordingly, the theory of class-wide impact based upon elimination of competition in the award of initial franchises is based on events that fall outside the class period.

Second, we reject Williams' contention that the non-compete clauses contained in the acquisition agreements made reentry by the acquired firms into the Philadelphia DMA unlikely because this theory is not fully supported by the record or the case law. While the acquisition agreements contained non-compete clauses, the swap transactions did not. Further, as Comcast points out, the time periods contained in those non-compete agreements were limited and the Class has not shown that a single counter-party ever sought to reenter the DMA after a

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[14] Dr. Teece testified that "these franchises were all given out, at least 98 percent of them were given out before the class period and so there's no fundamental change in any way because of the transactions with respect to original franchise rights." N.T. 10/26/09 at 121:3-7.

non-compete agreement expired. More significantly, non-compete agreements executed upon the sale of a business are generally not recognized as antitrust violations. *See Eichorn v. AT&T Corp.*, 248 F.3d 131, 145 (3d Cir. 2001) (stating that, as early as 1899, courts have recognized that covenants not to compete are not violations of § 1 of the Sherman Act; covenants not to compete executed upon the legitimate transfer of ownership of a business are ancillary restraints on trade and, so long as these covenants are reasonable in scope, there is no antitrust violation under the rule of reason).

With those caveats, we conclude that the Class has demonstrated that Dr. Williams' market structure analysis is susceptible to proof at trial through available evidence common to the class.

C. Market Performance Analysis

In his market performance analysis, Dr. Williams concludes that Comcast's rates for expanded basic cable are higher in the Philadelphia DMA than in other, more competitive DMAs, all else equal. (Williams Decl. ¶ 129.) Williams offers four economic explanations for Comcast's ability to charge higher prices. First, he contends that his economic analysis shows that Comcast's clustering activity made it economically feasible for Comcast to withhold regional sports programming from its competitors, which resulted in reduced penetration rates by DBS firms in the Philadelphia DMA and that reductions in DBS penetration rates cause cable rates to increase, all else equal. (*Id.* ¶ 128.) Second, he opines that Comcast's clustering activity reduced the extent of competition provided by overbuilders in the Philadelphia DMA, and that a reduction in overbuilding and the threat of overbuilding cause cable rates to

increase, all else equal. (*Id.* ¶ 131.) Third, he asserts that Comcast's clustering activity reduced "benchmark" competition, on which cable customers rely to compare the prices charged by competitors in a market. (*Id.* ¶¶ 144-62.) Fourth, he asserts that clustering increased Comcast's bargaining power in its negotiations with its content providers such as cable networks, which allowed Comcast to negotiate lower prices for its content and allowed it to increase cable subscriber rates. (*Id.* App'x at 2.)

1. Clustering and its effects on the ability of DBS competitors to access regional sports programming

Dr. Williams relies on Dr. Singer's report as a basis for his conclusion that Comcast had an economic incentive to deny CSN Philadelphia to DBS providers because of its percentage of subscribers in the Philadelphia DMA. In his April 10, 2009 report, Dr. Singer opines that "Comcast's unilateral exclusionary conduct with respect to three localized inputs" in the production of MVPD services constituted anti-competitive conduct. (Singer Decl. ¶ 13.) One of the three localized inputs he identifies is Comcast's alleged imposed exclusivity with regard to CSN Philadelphia's programming of local sports.[15]

Dr. Singer's report identifies regional sports programming as a relevant upstream product market, or an "input market." (*Id.* ¶ 32.) He defines this upstream market as the right to carry televised professional regional sports events such as the Philadelph-

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[15] The other two concern Comcast's conduct denying overbuilders access to construction contractors and interfering with their efforts to obtain local permits. We discuss these inputs in our discussion, infra, of overbuilder competition.

ia 76ers, Flyers and Phillies games. (*Id.* ¶ 29.) This content, he opines, is impossible to duplicate because there is only one professional franchise for each sport; fans generally follow their local team; and regional sports programming is not interchangeable with national sports programming, such as the NCAA basketball tournament, sports programming from another region, or non-sports programming. (*Id.*)

According to Dr. Singer, using its control of upstream inputs, "which Comcast secured by virtue of its clustering strategy," Comcast denies downstream rivals, principally the two DBS operators, access to Comcast's affiliated sports programming in the Philadelphia DMA and other markets. (*Id.* ¶ 64.) This forecloses DBS competitors from regional sports programming, and causes DBS providers to experience significantly lower than expected penetration rates in the Philadelphia DMA.[16] (*Id.* ¶ 66.) According to Dr. Singer, this demonstrates clear anticompetitive motivation to stifle competition in the downstream market by using market power in the upstream market. (*Id.* ¶ 68.) He points to evidence that Comcast does not seek to maximize profit in the upstream regional sports network market, but rather restricts output to gain market power vis-a-vis DBS competitors. (*Id.* ¶ 68.)

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16 According to Dr. Singer, the actual DBS penetration for Philadelphia as of March 2005 was 10.35%, while the predicted DBS penetration rate was 20.89%. (Singer Decl. ¶ 80 tbl.4.) However, as we discuss below, Dr. Teece shows that the actual DBS penetration rate was 19.2% by the first quarter of 2008. (Teece Report ¶ 48 ex. 4.)

Dr. Williams believes that if Comcast had a sufficiently small percentage of subscribers in the Philadelphia DMA, it would not be profitable for the company to deny access to DBS providers because (1) the forgone revenue on sales of CSN Philadelphia to DBS providers would be greater than (2) the gain in revenue on sales of multichannel video programming service to the incremental number of subscribers who would have switched to DBS had Comcast not denied access to CSN Philadelphia. Dr. Williams finds that Comcast's clustering of the Philadelphia DMA made it profitable for Comcast to deny DBS providers access to CSN Philadelphia. (Williams Decl. ¶¶ 28-29.) The resulting reductions in DBS penetration rates in the DMA caused cable rates to increase, all else equal.

Several reports generated by the Federal Communications Commission ("FCC") and the General Accounting Office ("GAO"), as well as academic studies, speak to the issue of whether DBS competition constrains cable prices; however, their results are not uniform. In its January 16, 2009 "Report on Cable Industry Prices," the FCC determined that, while "cable prices decrease substantially when a second wireline cable operator [an overbuilder] enters the market," it does not appear "that DBS effectively constrains cable prices." (Ex. D2 ¶ 3.[17]) The GAO, however, reached a different result in 2003, finding:

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[17] The data presented to support this assertion are comparisons in a bar graph of average prices for basic cable service in areas with no competition, areas of DBS competition, areas of wireless MVPD competition, areas of low cable penetration, and areas of competition from an overbuilder. While there was little difference between average cable prices in areas of no competition and areas of DBS competition, the study does find lower

[Footnote continued on next page]

DBS competition is associated with a slight reduction in cable rates as well as improved quality and service. In terms of rates, we found that a 10 percent higher DBS penetration rate in a franchise area is associated with a slight rate reduction – about 15 cents per month. Also, in areas where both primary DBS operators provide local broadcast stations, we found that the cable operators offer subscribers approximately 5 percent more cable networks than cable operators in areas where this is not the case. These results indicate that cable operators are responding to DBS competition and the provision of local broadcast stations by lowering rates slightly and improving their quality. During our interviews with cable operators, most operators told us that they responded to DBS competition through one or more of the following

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average cable prices in areas of overbuilder competition. (Ex. D2 at 5.) Dr. Williams criticized this result because the bar graph contains only raw data and does not represent a regression analysis:

> Q Can I ask – can I interrupt you for a second? Are those bar charts that are found on Page 5, are those a good starting point rather than an ending point?
>
> A I would say, yeah, sure, they're a good starting point. I think any – in any statistical analysis you want to look at the raw data and that's what this is, it's the raw data. But when you actually want to draw a scientifically based inference you don't just look at raw tables like this, you conduct a regression analysis.

(N.T. 10/15/09 at 144:3-11.)

> strategies: focusing on customer service, providing bundles of services to subscribers, and lowering prices and providing discounts.

(GAO "Issues Related to Competition and Subscriber Rates in the Cable Television Industry," (Oct. 2003) at 11.)

Other GAO reports, issued both before and after the 2003 report, while not making the same claim about DBS competition constraining cable prices, shed further light on the ability of DBS providers to compete with wireline cable companies, the crux of Dr. Singer's theories. In its October 2002 report entitled "Issues in Providing Cable and Satellite Television Services," the GAO concluded that the ability of the DBS companies to provide local broadcast channels was "associated with significantly higher DBS penetration rates." (Ex. D13 at 44; N.T. 10/26/09 at 29:17-30:17.) It found the DBS penetration rate was 32% higher in areas where local channels were available, suggesting "that in areas where local channels are available from both DBS providers, consumers are more likely to subscribe to DBS service, and therefore DBS appears to be more able to compete effectively for subscribers than in areas where local channels are not available from both DBS providers."[18] (*Id.*) The GAO did not find, however, that DBS companies' provision of local broadcast channels was associated with lower cable prices

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[18] The GAO also found that DBS penetration rates were higher in areas that require a relatively higher angle or elevation at which the satellite dish is mounted and is lower in areas where there are more multiple-dwelling units, which are associated with the need of DBS satellites dishes to "see" the satellite. (Ex. D13 at 45.)

and, thus, could not reject the hypothesis that provision of local channels has no impact on cable prices.[19] (*Id.* at 45.) In the GAO's next follow up report published in April 2005, it again focused on the availability of local channels, determining that it made DBS penetration rates significantly higher. (Ex. D3 at 32.) This report also found that DBS penetration rates are likely to be significantly higher in non-metropolitan areas, a factor the GAO associated with the historical development of satellite service, which had been marketed for many years in smaller and more rural areas. (*Id.*) As in its 2002 report, in 2005 the GAO found no correlation between DBS companies having access to local stations and lower cable prices. (*Id.* at 33.)

By analogy, these reports lend some support to Dr. Singer's theory that the foreclosure of DBS competitors to access to regional sports programming caused DBS providers to experience significantly lower than expected penetration rates in the Philadelphia DMA. Regional sports programming, like local broadcast channels, appeals to local audiences. While the reports do not study the effect of DBS foreclosure of access to regional sports programming (or the effect of clustering), if the ability of the DBS companies to provide local broadcast channels is associated with significantly higher DBS penetration rates, it seems appropriate to theorize that the abil-

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[19] However, in the same report, the GAO did find that cable prices were approximately 17% lower in areas where there was overbuilder competition and that higher cable prices are also associated with higher cable channel choice and with whether a cable company is affiliated with one of the ten largest MSOs. (*Id.* at 45.) We discuss the impact of overbuilder competition on cable prices infra.

ity to provide local sports coverage would have similar effects.

Surprisingly, this result is supported by Comcast's expert Dr. Teece. In his initial expert report – issued before Comcast had the benefit of examining the Class's DBS foreclosure theory – Dr. Teece reported that

> There have been several economic studies of competition between MVPDs that serve customers in the same geographic area. Many of these studies have concluded that there is significant competition between incumbent cable firms, DBS providers, and ILECs. Some studies have estimated empirically the competitive constraint that DBS imposes on cable system pricing. For example, [the October 2003] GAO study concluded that DBS competition has restricted cable prices. The study found that "as more households subscribe to DBS service, cable operators will ultimately respond by reducing rates." In another study, FCC economists Andrew Wise and Kiran Duwadi performed an econometric study of cable system pricing and found that "DBS providers are a constraining factor on quality-adjusted price increases for basic cable services by cable firms." Similarly, an empirical study by Austan Goolsbee and Amil Petrin indicates that "more competition from DBS is correlated with lower cable prices."
>
> Studies have also found evidence of non-price competition between cable and DBS, wireline overbuilders, and ILECs. A GAO study in 2000 found that cable companies re-

> sponded to competition from DBS by increasing the number of channels offered. Another GAO study found that in areas where both DBS competitors offered local-into-local via satellite the cable provider offered 5 percent more channels. This same study reported that in response to DBS competition, cable operators increased their focus on customer service and provided packages of services for customers. As noted above in Section II.B, Goolsbee and Petrin estimated an annual consumer surplus of $1 billion resulting from quality improvements by cable operators in response to DBS entry.

(Teece Expert Report ¶¶ 68-69.)

The proposition that DBS competition constrains cable prices is supported by the academic articles mentioned by Dr. Teece. Wise and Duwadi conclude that "DBS providers are a constraining factor on quality-adjusted price increases for basic cable services by cable firms." Andrew Stewart Wise and Kiran Duwadi, "Competition Between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks," J. Competition L. & E. 694, 701 (2005). Goolsbee and Petrin conclude that the data they examined "suggest that more competition from DBS is correlated with lower cable prices and somewhat higher quality cable." Austan Goolsbee and Amil Petrin, "The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV," 72 Econometrica 351, 377 (2004).

Notwithstanding the evidence supporting the theory that DBS competition can constrain cable prices, we conclude that the Class has not demon-

strated that Dr. Williams' and Dr. Singer's resulting opinion tying Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration rates is susceptible to proof at trial through available evidence common to the class. First, the decision not to license CSN Philadelphia to DBS providers occurred before the class period. Comcast established that it never licensed CSN Philadelphia to DBS companies, either before it established its cluster, during the formation of the cluster, or after clustering had been achieved. At all times since its debut on October 1, 1997, Comcast has distributed CSN Philadelphia programming via a terrestrial delivery network and has never distributed it via a satellite distribution system. *See DirecTV, Inc. v. Comcast Corp.*, 13 F.C.C. 21,822, 21,826 (1998); *EchoStar Commc'n Corp. v. Comcast, Corp.*, 14 F.C.C. 2089, 2093 (1999). Comcast's DBS competitors, DirecTV and EchoStar, sought to negotiate licenses to carry SportsNet between July and December 1997. *See id.* The decision not to license CSN Philadelphia to DirecTV occurred on September 8, 1997. *DirecTV*, 13 FCC Rcd at 21826-27. The decision not to license CSN Philadelphia to EchoStar occurred on January 7, 1998. *EchoStar*, 14 F.C.C. at 2093. Both decisions occurred prior to the class period and before Comcast began clustering cable systems in the Philadelphia region.

Second, the class certification record shows that Comcast's decision to deny access to regional sports programming to DBS competitors was based upon two factors unrelated to clustering. The first factor is that the FCC had specifically permitted Comcast to refuse to supply its DBS competitors with CSN Philadelphia pursuant to the terrestrial exception contained in the Program Access Rules of Section 628 of the Communications Act of 1934, 47 U.S.C.

§ 548(b).[20] The FCC determined that Comcast's decision to distribute CSN Philadelphia terrestrially was based upon valid business considerations, namely that the cost of terrestrial delivery was significantly less expensive. *See DirecTV, Inc. v. Comcast Corp.*, 15 F.C.C. 22,802, 22,808 (2000); *DirecTV*, 13 F.C.C. at 21,836; *EchoStar*, 14 F.C.C. at 2101. The second factor involved Comcast's own competitive disadvantage. Comcast declined to license CSN Philadelphia to its DBS competitors to counter its perceived competitive disadvantage arising from DirecTV's refusal to license NFL Sunday Ticket and other satellite-exclusive content, and attempted to maintain competitive balance by presenting CSN Philadelphia as a cable-only exclusive offering in the Philadelphia DMA. (Chipty Reply Decl. ¶ 19; Teece Decl. ¶ 63 (stating that unique content allows service providers to differentiate their offerings and to provide a more valuable service to consumers, thereby allowing them to compete more effectively for customers).)

Dr. Singer's opinion fails to recognize that Comcast has maintained its policy of distributing CSN

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[20] We recognize that, in making its decision interpreting the Program Access Rules, the FCC was not engaged in an antitrust analysis of Comcast's decision not to license CSN Philadelphia to the DBS providers and that its regulatory approval does not displace the antitrust laws. *See United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) (holding that the FCC was not given the power to decide antitrust issues and that its actions do not prevent enforcement of the antitrust laws in federal courts). Thus, the FCC's determination does not in any way control our antitrust analysis. We cite the FCC's decision only to show that Comcast organized its business relations knowing that it was not required under the Program Access Rules to provide CSN Philadelphia to satellite competitors.

Philadelphia only to wireline providers of video services since launching CSN Philadelphia in 1997, well before formation of the Philadelphia cluster. (Chipty Reply Decl. ¶¶ 16-17.) Dr. Singer also fails to recognize that Comcast **does** license CSN Philadelphia – as the Program Access Rules mandate – to other wireline MSOs, including RCN and Verizon, its primary non-satellite competitors in the Philadelphia DMA. Comcast never sought to maintain absolute exclusivity over regional sports programming and has always permitted its non-satellite competitors to license CSN Philadelphia under the Program Access Rules before, during, and once it achieved its cluster. (Teece Reply Decl. ¶¶ 34-36.) Because the DBS providers had no access to CSN Philadelphia before the cluster was formed, while subscribers of the MSOs that Comcast acquired in the swaps and transactions to create the cluster already had access to CSN Philadelphia, the Class has not demonstrated that Dr. Singer's and Dr. Williams' opinions tying Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration rates are susceptible to proof at trial through available evidence common to the class.

Finally, our conclusion that, on this record, the antitrust impact theory of clustering based on DBS foreclosure is not susceptible to proof at trial through available evidence common to the class is also supported by the data on DBS penetration rates in Philadelphia. Dr. Singer reports that the actual DBS penetration rate for Philadelphia as of March 2005 (the approximate midpoint of the class period) was 10.35%, while the predicted DBS penetration rate was 20.89%. (Singer Report ¶ 80 tbl. 4.) He bases his clustering/DBS foreclosure opinion on this discrepancy. However, Dr. Teece shows that, by the

first quarter of 2008, the actual DBS penetration rate was 19.2% , quite close to the predicted rate cited by Dr. Singer. (Teece Reply Decl. ¶ 48 ex. 4.) Dr. Teece's data also show that DBS penetration has experienced higher than average growth during the class period, increasing more rapidly in the Philadelphia DMA (327%) than in the nation as a whole (155%) **after** Comcast's clustering activity had already occurred.[21] (Teece Reply Decl. ¶ 49.) Dr. Teece concludes from this data that the "ability of DBS providers to compete successfully with Philadelphia SportsNet suggests that Philadelphia SportsNet may not be essential for DBS providers to compete effectively. It also indicates that Comcast's decision not to license Philadelphia SportsNet to DBS providers did not anticompetitively foreclose DBS providers from competing effectively in the Philadelphia DMA." (*Id.* ¶ 50).

2. Clustering and its antitrust impact on overbuilder competition

According to Dr. Williams, Comcast's clustering strategy, achieved by acquiring competing cable operators, changed the Philadelphia DMA from one previously not owned by a large MSO, to one that was dominated by a large MSO. He theorizes that

> Econometric studies show that, all else equal, ownership of a cable system by a large MSO

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21 The FCC reports that, nationwide, cable operators' share of all MVPD subscribers has also declined relative to the share attained by DBS providers. As of June 30, 2006, cable operators served 68.2% of MVPD subscribers, compared to 69.4% one year earlier. DBS providers saw their share of MVPD subscribers grow during the same period from 27.7% to 29.2%. (Thirteenth Annual Report, Ex. D37 ¶ 169.)

> (typically defined as one of the ten largest MSOs) generally results in higher rates of approximately 5% to 10%. . . . Excluding swaps, a number of Comcast's acquisitions in the Philadelphia DMA had the effect of changing the ownership of the acquired cable systems from (1) not being owned by a large MSO to (2) being owned by a large MSO. Empirically, since large MSOs are generally clustered, the MSO variable picks up clustering effects.

(Williams Decl. ¶ 52.) He goes on to discuss the clustering effects resulting from the switch to domination by a large MSO as part of his discussion of the relevant geographic market:

> Based on the empirical literature regarding the MSO and clustering effects, Comcast's swaps and acquisitions have caused subscribers to pay higher rates of approximately 7.5% to 14%. These results provide empirical support for the conclusion reached in both the overbuilding and clustering models . . . that clusters lead to higher cable rates. These rate increases are more than a SSNIP [a small but significant and nontransitory increase in price] (generally evaluated with a 5% price increase), despite the fact that Comcast is not the only provider of multichannel video programming service in the Philadelphia DMA, and consequently has less (or at least no more) market power than would a hypothetical monopolist of multichannel video programming service in the Philadelphia DMA to which the SSNIP test applies. Therefore, relative to the rates that would be

> paid by Comcast's subscribers in the Philadelphia DMA but for the swaps and acquisitions, a hypothetical monopolist of multichannel video programming service in the Philadelphia DMA would profitably impose a SSNIP. The relevant geographic market for analyzing Comcast's alleged anticompetitive conduct is, therefore, the Philadelphia DMA.

(*Id.* ¶ 54.) He concludes that an MSO

> can increase its profits by clustering its cable systems so that they share their boundaries with one another and share as little total boundary as possible with other cable providers serving adjacent areas. Such contiguous clustering is profit-enhancing for an MSO because it reduces the likelihood or amount of overbuilding into its franchise areas.
>
> . . .
>
> Clustering also deters overbuilding by enhancing the clustering incumbent's ability to increase the cost and reduce the benefits of overbuilding. Savings from consolidation of plant and equipment and from operating efficiencies flow to the clustering incumbent. Clustering additionally allows the incumbent to charge higher advertising fees. These benefits to clustering increase the incumbent's incentives as well as its financial capacity to expend resources on strategies to block sustainable overbuilding.

(*Id.* ¶¶ 88, 90.) To reduce the incentive for competitors to overbuild, Williams finds it is optimal for an MSO to arrange its cable systems to minimize boundaries, and the optimal way to accomplish this

is to "cluster," i.e. acquire contiguous cable systems. (*Id.* ¶ 92.)

He goes on to opine that there are several consequences arising from the resulting reduction in overbuilding within the MSO's franchise areas:

- the MSO's total profits are typically higher when there is less overbuilding;
- the monthly rate for cable services paid by a household will typically be higher when (1) an overbuilder does not pass by the household as compared to when (2) an overbuilder does pass by the household due to the reduction in head-to-head competition faced by the MSO;
- the absence of overbuilding within a franchise area can lead to higher rates even for households in that franchise area that would not have been passed by the overbuilder; and
- the incumbent cable system will optimally reduce the rate it charges subscribers without access to an overbuilder (though by less than it reduces the rates to customers in homes passed by the overbuilder) because the marginal cost of providing service to them is lower than that of the overbuilt households. Accordingly, even partial overbuilding in a franchise area can lead to lower rates throughout the franchise area.

(*Id.* ¶¶ 93-94.)

Dr. Williams supports his opinions by presenting two economic models of overbuilding. (Williams Decl. App'x II at 107-25; Williams Cl. Reply Decl. App'x I at 13-18.) His first model attempts to analyze the effect of clustering on the impact of over-

building on profits and prices by comparing situations where incumbent cable franchise areas are interspersed and where they are contiguous. (Williams Decl. ¶ 168.) He asserts that economic evidence supports the assumption that, where franchises areas are interspersed, an incumbent monopolist cable company can drop its rate in areas where it experiences overbuilder competition from an operator in a neighboring franchise, but charge a different price in non-overbuilt areas. (*Id.* ¶ 181.) He supports his conclusion with evidence that Comcast has instituted a discount called the Comcast Advantage Plan to offer discounts or rate freezes to consumers who agreed not to switch their service to RCN. (*Id.*) Dr. Williams also theorizes that prices paid by consumers in areas that remain monopolized also fall; this price reduction occurs because the portion of the incumbent cable firm's franchise area that it monopolizes is now shorter in length and so the marginal cost of servicing that portion has fallen, leading to a reduction in the monopoly price. (*Id.* ¶ 182.) He opines that the lowest price is achieved with complete overbuilding, i.e., where the entirety of the incumbent cable firm's region is served by both the incumbent firm and an overbuilder. (*Id.* ¶ 184.) He concludes that it is economically optimal for an overbuilder to overbuild into the incumbent operator's regions because, for small amounts of overbuilding, the incumbent's profits will strictly decrease, the overbuilder's profits will strictly increase, and the prices paid by households will strictly fall, both in the overbuilt region and in the region that remains monopolized. (*Id.* ¶ 185.)

Because it is easier for an overbuilder to affect the monopolist's price where the monopolist's franchise areas are interspersed, Dr. Williams asserts

that the incumbent cable firm will enjoy substantial benefits from clustering its franchise areas through purchases or swaps so that they are contiguous. Where franchise areas are contiguous, Dr. Williams asserts that the incumbent cable firm's decrease in profits is roughly four times lower than where the franchise areas are interspersed. Clustering, he asserts, reduces competition that would otherwise result from optimal overbuilding and, as a consequence, leads to higher profits and higher prices not only in areas where competition is precluded, but also in areas where the incumbent cable firm would have remained a monopolist. This occurs because, given nearby overbuilding, the marginal cost of servicing the non-overbuilt areas falls and the incumbent cable firm is able to price discriminate between the non-overbuilt and overbuilt areas. (*Id.* ¶ 188.)

In response to Dr. Teece's criticisms of Dr. Williams' first model, which concerns itself only with overbuilding by an incumbent adjacent cable operator,[22] Dr. Williams created a second model more specifically addressing the experience of overbuilding revealed by the record in this case. In his second

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[22] Dr. Teece faulted Dr. Williams' premise that adjacent cable operators would overbuild into another's territory, because it has never in fact happened and the Class offered no proof that it ever happened. He adds that cable overbuilding by a dedicated overbuilder is also rare. Dr. Teece cites data on cable overbuilding in Pennsylvania, New Jersey and Delaware suggesting that when overbuilding does occur, it occurs at similar rates in unclustered cable systems as in large cable clusters during the relevant period. (Teece Reply Decl. ¶¶ 142-45.) He asserts that the data are inconsistent with a theory that clustering deters overbuilding because the data on actual overbuilding does not support the existence of a negative relationship between clustering and overbuilding. (*Id.* ¶ 147.)

model, Dr. Williams provides an economic theory of overbuilding that applies to an overbuilder, such as RCN, whose existing facilities overlay a franchise area served by an incumbent operator, examining the two alternative scenarios of where franchise areas are interspersed and where they are clustered. Williams assumes that an existing cable operator that wishes to overbuild into a neighboring franchise area will build out from its boundary to minimize the cost of building into and servicing the new area. Because an overbuilder entrant has no existing infrastructure, unlike a neighboring MSO that decides to overbuild a neighboring franchise area, it will optimally choose a location from which to begin overbuilding, and it will build outward, in a contiguous fashion, from that point.[23] This "buildout" effect, Williams asserts, gives an incumbent cable operator the incentive to cluster. (Williams Cl. Reply Decl. App'x I at 13.)

Williams' model assumes an operator who is a monopolist within each of two geographically separated franchise areas within a single DMA, that these areas are identical, and that the monopolist's profits in each area are equal. Because the two areas are geographically separated, an overbuilder that begins in one area will not reach the other area for some time, if at all, by the buildout effect. For simplicity, Williams assumes that the overbuilder would not reach the second area at all. Consequently, the monopolist would be willing to pay up to the difference between its monopoly profit and its competitive prof-

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[23] The GAO has recognized that cable overbuilders tend to enter markets that are geographically close in proximity to its other key facilities, such as its headquarters, existing network, or other needed infrastructure. (Ex. D29 at 5.)

it to keep the overbuilder out of the franchise area it is threatening to enter, where its competitive profit is the (lower) profit the monopolist would earn if the overbuilder successfully entered and they competed with the aim to maximize profits.

If, on the other hand, the monopolist's two franchise areas are contiguous, i.e., clustered, Dr. Williams theorizes that the monopolist would be willing to pay up to twice the difference between its monopoly profit and its competitive profit to keep the overbuilder entrant out. This is because a successful entrant that builds outward may well overbuild the incumbent's two contiguous franchise areas, reducing profits from monopoly profit in each area to competitive profit in each area. Because its monopoly profit will be threatened in more areas, Williams theorizes that the amount the monopolist will expend to fight the entry of an overbuilder will always be higher where its franchise areas are clustered than where its franchises are interspersed. (*Id.* App'x I at 16.) From these assumptions, Dr. Williams asserts that his model demonstrates that

> the monopolist may strictly prefer to cluster its franchise areas. When this occurs, there are several effects. First, clustering its franchise areas reduces the likelihood that an entrant attempts to enter. Second, given that an entrant does attempt to enter, clustering its franchise areas reduces the likelihood that the entrant's attempt is successful. Third, clustering its franchise areas increases the monopolist's expected profits without any increase in efficiency. Fourth, under the assumption that successful entry reduces prices, clustering its franchise areas increas-

> es the price the monopolist charges its customers on average.

(*Id.* App'x I at 18.)

Dr. Williams also cites to reports issued by the FCC and the GAO to support his opinion that clustering creates antitrust impact by discouraging overbuilding. The 1992 Cable Act requires the FCC to issue annual reports that compare rates charged by cable systems facing effective competition with those not facing effective competition. In its annual reports on cable industry rates, the FCC has performed a number of regression analyses on cable rates, using data from 1995 to 2008. Williams asserts that this econometric research provides support for Dr. McClave's damages analysis and his own theories of antitrust impact and market definitions.[24] (Williams Decl. ¶ 133.) He contends that this research also explains in part how Comcast's conduct in this case resulted in cable subscribers in the Philadelphia DMA paying higher rates. Dr. Williams summarizes the reports as follows:

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[24] It is undisputed by the experts that multiple regression analysis is an acceptable and widely recognized statistical tool for measuring antitrust impact. (Chipty Report ¶ 62 ("A regression is the standard econometric technique used in problems like this one, i.e., to adjust for observable differences across cable systems so as to evaluate whether, all else equal, overbuilding is less common or prices are higher in Philadelphia than in otherwise comparable areas."); McClave 5/11/09 Merits Rebuttal Decl. at 2 ("There is one area on which Dr. Chipty and I agree. In my initial Declaration, I showed that damages could be estimated for the class employing the commonly accepted methodology of multiple regression analysis. Dr. Chipty appears to agree, since she also employs a similar methodological approach to estimating damages on a class-wide basis.").)

- The FCC reports find that, all else equal, a cable system facing competition from an overbuilder has rates that are generally 5% to 15% lower than rates for cable systems that do not face competition from an overbuilder. This supports the conclusion that Comcast's actions, which reduced the extent of competition provided by overbuilders in the Philadelphia DMA, caused cable rates to increase, all else equal.[25]
- The FCC reports find that, all else equal, a 10% increase in an MSO's total number of national subscribers leads to rate increases of approximately 2% to 3%, supporting the conclusion of Dr. Williams' clustering model that increases in the number of cable systems owned by an MSO lead to higher rates.
- The FCC reports find that, all else equal, a cable system in a cluster of cable systems owned by an MSO has rates that are approximately 2.5% higher than rates for cable systems not in such a cluster, supporting the conclusion that Comcast's actions caused cable rates to increase, all else equal.

(*Id.* ¶ 133.) Dr. Williams also cites to reports issued by the GAO evaluating the effects of several key factors affecting cable rates, using data from 1998 to 2004:

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25 For example, in the FCC's Thirteenth Annual Report on the cable industry, published January 16, 2009, it found that prices charged by cable systems that did not have effective competition were on average 7.9% higher. (Ex. D37 ¶ 45.)

- The GAO reports find that, all else equal, a cable system facing competition from an overbuilder (including LECs) has rates that are approximately 7% to 18% lower than rates for cable systems that do not face competition from an overbuilder. This supports the conclusion that Comcast's actions, which reduced the extent of competition provided by overbuilders in the Philadelphia DMA, caused cable rates to increase, all else equal.
- The GAO reports find that, all else equal, a cable system affiliated with a large MSO has rates that are generally 5% to 9% higher than rates for cable systems not affiliated with a large MSO, supporting the conclusion that Comcast's actions caused cable rates to increase, all else equal.

(*Id.* ¶ 134.)

Finally, Dr. Williams relies on the following published academic research to support his opinion that clustering creates antitrust impact by discouraging overbuilding:

- An empirical analysis by Clements and Brown (2006) of factors affecting cable rates using data from 2001. They assert that their analysis models cable rates as a function of several independent variables, including whether a cable system is affiliated with one of the ten largest MSOs in the country, the presence of a second wire-based MVPD provider such as an overbuilder or an LEC, per capita income, population density, and the capacity of the cable system in megahertz, and determine that affiliation with a large MSO led to higher cable rates. Specifically, all else equal, the re-

searchers find that a cable system that is affiliated with one of the ten largest MSOs has monthly rates that are on average $2.48 higher (6.9% evaluated at the average monthly rate) than similar systems not affiliated with such an MSO. The authors also find that the presence of a second wire-based MVPD provider lowered monthly rates, all else equal, by $5.63 (approximately 15.7% evaluated at the average monthly rate) relative to similar systems without such competition. (*Id.* ¶ 135.) Williams asserts that this result is consistent with his own clustering model.

- A study by Savage and Wirth (2005) examining the effect of potential competition from a wire-based MVPD provider such as an overbuilder or ILEC on cable rates and on the number of channels offered by incumbent cable operators. Williams states that Savage and Wirth find that when the probability of entry of an overbuilder rises to 42%, the average cable system provides six more channels, and the monthly revenue per channel declines from $0.77 to $0.66 (a decline of 8.6%), supporting Williams' conclusion that clustering raises rates or reduces the number of channels, all else equal. (*Id.* ¶ 136.)
- A study by Karikari, Brown, and Abramowitz (2003) examining factors that affect DBS penetration rates and cable rates. Williams asserts that, consistent with the Clements and Brown study, these researchers find that when a cable system is owned by one of the ten largest MSOs, its monthly rates are approximately 5% higher than similar systems not affiliated

with such an MSO, all else equal, again supporting the results of his own clustering model. They also find that the presence of a second wire-based MVPD provider lowers monthly rates, all else equal, by approximately 10% compared to similar systems without such competition. (*Id.* ¶ 137.)

- A study by Dr. Singer (2002) analyzing whether clustering reduces the likelihood of entry by an overbuilder. Singer finds that the presence of a cluster makes an overbuilder entry less likely, supporting Williams' overbuilding model showing that clusters reduce the likelihood of entry by wire-based MVPD providers, resulting in higher rates, all else equal. (*Id.* ¶ 138.)
- A study by Emmons and Prager (1997) also examining the effect of competition on cable rates and finding that when an incumbent cable system faces competition from a wire-based rival, its rates are lower, all else equal, by approximately 20%. They also find that as the number of cable systems owned by an MSO increased, its rates increased as well, by approximately 2%, supporting Williams' clustering model. (*Id.* ¶ 139.)
- A study by Beil, Dazzio, Ekelund, and Jackson (1993) examining factors affecting cable penetration rates and basic cable rates, and determining that wire-based competition lowers basic monthly cable rates by $3.21 and pay channel rates by $1.15. (*Id.* ¶ 140.)

Together, Williams asserts, these studies provide empirical support for his conclusion that Comcast's conduct resulted in subscribers paying higher cable

rates in the Philadelphia DMA and provide empirical support for his overbuilding and clustering models.[26]

Dr. Williams also bases his opinions on the expert reports submitted by Dr. Singer. In his report, Dr. Singer included a substantial analysis of how Comcast's clustering strategy denied overbuilders access to the relevant market. (Singer Decl. ¶¶ 95-136.) This analysis includes discussion of Comcast's alleged strategy initially to deny overbuilders access to CSN Philadelphia and then, after the FCC ruled it was required to offer CSN Philadelphia to wireline but not satellite competitors, to artificially inflate the price of CSN Philadelphia to those competitors. (*Id.* ¶¶ 97-110.) Dr. Singer also has analyzed Comcast's alleged interference with overbuilder RCN's efforts to construct rival systems by limiting RCN's access to local contractors through the enforcement of non-compete clauses. (*Id.* ¶¶ 62-63, 111-12.) Finally, Dr. Singer has analyzed the effect on customers of the Comcast Advantage Plan, through which Comcast offered discounts or rate freezes to consumers who agreed not to switch to RCN, noting that this offer was never made to customers before RCN began to enter the area, or to customers in areas not served by RCN. (*Id.* ¶¶ 113-18.) Dr. Singer opines that Comcast denied overbuilders such as RCN and Verizon access to"critical local inputs," by restricting access to regional sports programming, entering into exclusive arrangements with cable infrastructure

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[26] In addition to the government and academic resources he cites to support his theories, Dr. Williams tabulates data on the responses of incumbent cable operators to entry by an overbuilder, cataloging 26 incidents nationwide of price reductions by cable operators faced with the entry of an overbuilder. (Williams Decl. ¶ 143 tbl.6.)

contractors, and interfering with local franchising processes, which impaired the overbuilders' ability to compete effectively with Comcast for MVPD service in the Philadelphia DMA. (*Id.* ¶ 77.)

With regard to contractors, Singer states that Comcast sought to interfere with RCN's efforts to construct systems in the Philadelphia suburbs by limiting RCN's access to the local contractors upon which RCN relied to construct, operate, and maintain its competing infrastructure. (*Id.* ¶ 93.) It did so by entering into and enforcing non-compete clauses with its Philadelphia-area contractors, threatening its contractors with a loss of work in the event that they performed services for Comcast's competitors, and included explicit provisions in its contract that installers not "perform any Contractor Services" in areas where Bell Atlantic, GTE, Conestoga, Commonwealth, or RCN competed with Comcast. (*Id.*) He opines that there was no compelling justification for this conduct other than as part of a strategy to impede competition in the Philadelphia DMA. (*Id.* ¶ 94.)

With regard to local franchising processes, Singer states that, despite obtaining approval from the FCC and from nine Philadelphia suburbs, RCN could not obtain approval from the City of Philadelphia to begin construction. He states that Comcast played a central role in pressuring City officials to delay or deny RCN's entry into the Philadelphia market. Citing newspaper and periodical stories as the factual basis for his discussion, Singer states that Comcast lobbied both the Mayor and City Council to block or delay RCN's permit approvals in the City, imploring the City to "use its substantial regulatory powers to monitor and mitigate conditions which might other-

wise allow RCN to cherry-pick its way to profitability." (*Id.* ¶ 130.) Singer reports that these efforts delayed Council action on RCN's application for two and one half years, until RCN considered filing a federal lawsuit or a complaint with the FCC, and leading shortly thereafter to RCN's announcement that it was withdrawing its application to build a competitive cable system in the City of Philadelphia. Finally, Singer cites as evidence that Comcast lobbied against state-wide franchise licensing in Pennsylvania by meeting with lawmakers in March 2006, arguing that a state-wide license would strip local communities of their power.

Having shown that Comcast acted to limit overbuilder competition, Dr. Singer opines that many academic studies have found that cable prices are lower when overbuilder competition is present. He also describes the analyses conducted by the FCC and the GAO discussed supra, as well as his own academic studies and those of other economists who have studied the effect of overbuilder competition. (*Id.* ¶¶ 107-08.) Dr. Singer has also compiled sources that he asserts the Class may use as common proof that impaired overbuilder competition leads to a reduction in consumer welfare. (Singer Cl. Decl. at 13 tbl. 5.) He asserts that this evidence indicates that exclusionary conduct toward overbuilders results in higher prices for consumers, and represents evidence common to the class that is relevant for cable customers for whom an incumbent cable company has impaired or thwarted competition from overbuilders and hence caused prices to be elevated above otherwise equilibrium prices. (*Id.* ¶ 15.)

Dr. Williams, summarizing Dr. Singer's report, states that

> Dr. Singer has found that, consistent with his prior empirical work and the results of the overbuilding model . . . , Comcast's conduct reduced the extent of competition provided by overbuilders in the Philadelphia DMA. Thus, Comcast's anticompetitive actions have caused subscribers to pay higher cable rates, and higher by more than a SSNIP, than those subscribers would have paid but for the effect of Comcast's anticompetitive actions on overbuilders. . . .
>
> In sum, economic analysis shows that Comcast's alleged anticompetitive conduct in the Philadelphia DMA reduced the extent of competition provided by overbuilders in the Philadelphia DMA. Econometric evidence shows that reductions in overbuilding cause cable rates to increase, all else equal. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA.

(Williams Decl. ¶ 55-56.)

Dr. Teece challenges the class experts' opinions regarding the effect of clustering on overbuilding.[27]

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[27] Dr. Teece also challenges the class experts' assumptions that clustering is itself anticompetitive. According to Dr. Teece, rather than being anticompetitive, clustering lowers the cost of deploying advanced services and operating a cable system because more subscribers can be served from a particular headend or other central facility such as a customer service center. This makes a clustered operator a more effective competitor because it can offer consumers better services at lower cost. (Teece Reply Decl. ¶ 141.) Dr. Williams responds that his report demonstrates that clustering is anticompetitive because it

[Footnote continued on next page]

Dr. Teece opines that cable overbuilding has been limited, not because of clustering activity by incumbent operators, but because it is not a viable business model.[28] Overbuilding, he explains, requires a large fixed capital investment, including head-end equipment, deploying cable networks, and expenses related to acquiring franchises. Also, the overbuilder must offer superior prices or quality compared to the incumbent to attract customers. Taken together, Dr. Teece asserts that these factors imply that overbuilders must achieve significant penetration in the overbuilt area merely to break even. He cites testimony from Gerry Lenfest of Lenfest Communications

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[Footnote continued from previous page]
reduces the shared boundaries between two cable companies, a conclusion that Dr. Teece's report supports, since he also finds that overbuilders tend to build in adjacent areas. (Williams Cl. Reply Decl. ¶ 65 (citing Teece Reply Decl. ¶¶ 107-08).) Dr. Williams also notes that the FCC has reached the conclusion that "clustering can present a barrier to entry for the most likely potential overbuilder (i.e., an adjacent cable operator)." (*Id.* (quoting FCC Thirteenth Annual Report).)

[28] In its 2004 Report on competition from overbuilders, the GAO reported that, in addition to demographic factors, financial obstacles hindered the success of overbuilders. (Ex. D29 at 1.) Its survey of overbuilders determined that they were experiencing financial difficulties, that they were putting off network expansion, and that two companies lacked the resources necessary to adequately service their existing markets. (*Id.*) The GAO also found that the overbuilder business strategy can be difficult to implement because of their inability to gain access to certain cable networks, difficulty in gaining access to residents of multi-dwelling structures, and difficulties securing continued access to adequate financial resources needed for rap id construction of their networks and to market their services. (*Id.* at 5.) The GAO concluded that the long-term viability of overbuilders was not clear. (*Id.* at 28.)

that an overbuilder needs to acquire half of the incumbent's subscribers to be viable. (Teece Reply Decl. ¶ 148.) He also asserts that this view is consistent with the actual experience of overbuilders in the past few years, namely that no overbuilder has ever succeeded in the United States. (*Id.* ¶ 151.)

In contrast, Dr. Teece explains that large scale overbuilding by LECs in clustered areas has been successful, which further calls into question Dr. Williams' theory that clustering negatively impacts overbuilders. Verizon and AT&T have begun offering video service in many areas across the country in competition with incumbent cable operators and DBS providers. (*Id.* ¶ 153.) Dr. Teece asserts that this large-scale overbuilding by LECs in already clustered areas indicates that clustering does not anticompetitively deter entry by MVPD competitors.[29] (*Id.* ¶ 154.)

Dr. Teece also opines that Dr. Williams' and Dr. Singer's conclusions with regard to antitrust impact of overbuilding in the Philadelphia DMA are not based on actual fact. He states that, "even accepting plaintiffs' claim that RCN would have entered addi-

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[29] Dr. Teece identifies several reasons why overbuilding by LECs has been more successful than cable overbuilding. First, LECs do not build an entire new network from scratch, but rather upgrade their existing networks to provide the additional data and video services. Second, LECs have no requirement to build out an entire franchise area, but can pick and choose where to most profitably expand their service. Third, LECs have strong economic incentives to overbuild because cable companies have begun to offer competing voice service, and they risk losing telephone customers to cable companies offering to package voice, video and data services. (Teece Reply Decl. ¶ 155.)

tional areas in the but-for world, I have seen no evidence that RCN ever intended to build out the entire Philadelphia DMA. Indeed, Dr. Singer, Dr. Williams, and Dr. McClave all assume that but-for the challenged conduct, RCN would have only overbuilt in five counties—Bucks, Chester, Delaware, Montgomery, and Philadelphia." (Teece Cl. Reply Decl. ¶ 119.) Teece notes that while RCN filed with the FCC to operate an Open Video System ("OVS"), an OVS certification filing is an inadequate basis for assuming that RCN would have entered into these five counties (let alone that RCN would have overbuilt the entire counties). He contends that such a filing does not necessarily indicate the ability to actually overbuild those areas. Thus, a company may file a certification, but never actually proceed. For example, RCN submitted filings to the FCC for OVS certification in Portland, Oregon (and surrounding communities), Seattle, Washington (and surrounding communities), Phoenix, Arizona (and surrounding communities) and South Florida, but has not actually entered any of those areas. (*Id.* ¶ 120.)

Dr. Teece contends that it is unlikely that RCN would have overbuilt in each of these five counties in the but-for world[30] (much less in all five in their entirety). He bases this contention on the fact that RCN faced financial difficulties during the class period that were unrelated to the challenged conduct, and filed for bankruptcy in 2004; even prior to its bankruptcy, RCN announced in 2001 it was halting expansion plans in Philadelphia, citing softening

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30 The experts use the term "but-for world" to describe the hypothetical conditions that would have prevailed had Comcast not engaged in the allegedly anticompetitive conduct at issue in the case.

capital markets; and the record shows that RCN never intended to build out the entire Philadelphia County, and in fact protested when the City of Philadelphia was considering requiring RCN to do so. (*Id.* ¶ 121.)

Dr. Teece also opines that, even if RCN would have overbuilt all five counties entirely in the but-for world, this would not be sufficient to conclude that the antitrust impact of the challenged conduct would have affected all Comcast customers in the Philadelphia DMA. This is because the five counties account for just a portion of the 18-county Philadelphia DMA; even if RCN would have overbuilt all five counties in their entirety, it would still have offered service to just 20 percent of total households in the DMA. (*Id.* ¶ 122.) Accordingly, he concludes that "even accepting plaintiffs' theories, the impact of the alleged anticompetitive conduct would vary within the DMA, depending on the presence (or absence) of RCN overbuilding. Individualized analysis therefore would be required to determine the competitive impact in a local area." (*Id.* ¶ 123.)

Dr. Williams responds to Dr. Teece by asserting that but for Comcast's alleged anticompetitive conduct, RCN likely would have continued to pursue its strategy of building into other areas in the Philadelphia DMA adjacent to its existing cable infrastructure, beyond the five counties to which he and Dr. Singer conservatively limited their examination. (Williams Cl. Reply Decl. ¶ 13.) Moreover, he reiterates, the economic theories of overbuilding and the empirical evidence presented in his declarations indicate that clustering deters overbuilding. He also refers to econometric evidence showing that, all else equal, (1) competition from overbuilders lowers rates

by approximately 10% to 20%; (2) Comcast's conduct reduced the extent of competition provided by overbuilders in the Philadelphia DMA; thus, (3) its anticompetitive actions have caused subscribers to pay higher cable rates, and higher by more than a SSNIP than those subscribers would have paid but for the effect of Comcast's anticompetitive actions on overbuilders; and (4) these rate increases are more than a SSNIP, despite the fact that Comcast is not the only provider of multichannel video programming service in the Philadelphia area, and consequently has less (or at least no more) market power than would a hypothetical monopolist of multichannel video programming service in the Philadelphia area to which the SSNIP test applies. (*Id.* ¶ 14.)

We conclude, with one caveat, that the Class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class. The Class has successfully shown, through Dr. Williams' model, as well as his citations to empirical studies conducted by governmental agencies and private researchers, that the presence of an overbuilder constrains cable prices. The Class has also shown that Comcast engaged in conduct designed to deter the entry of overbuilders in the Philadelphia DMA, including denying RCN access to the services of cable installation contractors.

We are not persuaded by Dr. Teece's criticism of the overbuilder model based on his assertion that the Class cannot demonstrate that overbuilding is a successful business model. The evidence demonstrates that there has been a historic and continuing presence of overbuilders in the wireline cable industry, and governmental studies finding that overbuilder

competition constrains cable prices are further proof that it has been a viable business model. We also are not persuaded by his criticisms based on his assertions that it is unlikely that RCN would have overbuilt in each of these five counties in the but-for world, that its efforts in each of the five counties was limited, and that its efforts in these five counties cannot establish common evidence of impact in the entire eighteen county DMA. What Dr. Teece considers "unlikely," Dr. Singer considers to be the common evidence of antitrust impact, namely that RCN was stymied in its efforts by Comcast's predatory behavior.

In reaching our conclusion on the common impact of clustering on overbuilding, however, we place no reliance on Dr. Singer's opinions regarding Comcast's lobbying activities. Comcast argues that Singer's theory is at odds with the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (holding that an individual is immune from antitrust liability for exercising First Amendment right to petition the government). For purposes of class certification, we must consider both whether plaintiff's legal claim is plausible in theory, and, if so, whether it is also susceptible to proof at trial through available evidence common to the class. *Jackson*, 260 F.R.D. at 184 (quoting *Hydrogen Peroxide*, 552 F.3d at 325).

Any aspect of the Class's overbuilder theory of antitrust impact based upon Comcast's lobbying activity is not plausible. While Class counsel contended during his closing argument that Dr. Singer properly considered Comcast's lobbying activities as

evidence of its anti-competitive purpose and motives (N.T. 11/16/2009 at 30:15-31:19), "parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent." *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988); *see also Westmac, Inc. v. Smith*, 797 F.2d 313, 315 (6th Cir. 1986) ("[G]enuine attempts to influence passage or enforcement of laws are immune from antitrust scrutiny, regardless of the anticompetitive purpose behind such attempts."); *Tal v. Hogan*, 453 F.3d 1244, 1259 (10th Cir. 2006) (holding that *Noerr-Pennington* doctrine "exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition") (quoting *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503 (10th Cir. 1997)).

3. Clustering and its effects on benchmark competition

Dr. Williams also attempts to establish, through common evidence, that Comcast's clustering activity eliminated "benchmark" competition in the Philadelphia DMA. According to Dr. Williams,

> The theory of benchmark (or yardstick) competition as a means of regulating public utilities was developed in a seminal paper by Andrei Shleifer. Professor Shleifer noted that the practice of benchmark regulation, as exemplified by Medicare's policy of reimbursing a hospital based on the average costs of comparable hospitals, predated his theoretical work, as did other regulatory approaches based on cost comparisons across firms. Pro-

> fessor Shleifer's work gave rise to a substantial literature on benchmark competition and contributed to the further development of regulatory practices based on comparative evaluations. The economics literature recognizes that benchmark competition can cause firms to offer lower prices and/or improved service quality.

(Williams Decl. ¶ 144.) In order for benchmark competition to cause firms to lower prices and improve service, there must be comparable firms against which comparisons can be made. Dr. Williams opines that "[s]waps and acquisitions that reduce the number of comparable firms diminish the effectiveness of benchmark competition and can result in an increase in rates." (*Id.* ¶ 145.) He asserts that both regulators and consumers can and do rely on benchmarks. (*Id.* ¶¶ 146, 154.) He theorizes, based on a survey showing that cable customers in the Philadelphia DMA reported lower awareness of alternative cable providers in their neighborhoods, that the relative lack of benchmarking information for cable subscribers in the Philadelphia DMA reflects a reduction in benchmark competition. (*Id.* ¶ 155.) Based on evidence that (1) the FCC recognizes benchmark competition; (2) Comcast monitors the rates of other MSOs and is mindful of how its rate increases are perceived by government officials; (3) local franchise area officials in Los Angeles were concerned with the reduction in benchmark comparisons due to Time Warner's consolidation of the Los Angeles area cable market via the swap transactions with Comcast; (4) the above mentioned survey of cable subscribers' awareness of alternative cable providers shows a lower awareness rate in Philadelphia; (5) customer complaints indicating that when cus-

tomers are aware of prices charged by other operators in their market they will act on that awareness by complaining to Comcast; and (6) internal Comcast documents showing that Comcast executives use benchmarks; *id.* ¶ 146-61; Williams concludes that

> Cable regulators and cable customers rely on, and cable operators engage in, benchmark competition. Comcast's swaps and acquisitions in the Philadelphia DMA had the effect of removing eight firms that offered comparable benchmarks in terms of rates and service quality. Thus, Comcast's swaps and acquisitions resulted in a reduction in benchmark competition.

(*Id.* ¶ 162.)

Comcast and its experts dispute the evidence Dr. Williams uses to support his benchmark competition theory. Dr. Teece contends that Dr. Williams' theory that clustering reduces benchmarking and therefore leads to higher cable rates lacks any economic or empirical basis. He explains that there is an implicit assumption in Dr. Williams' theory that benchmarks must be nearby (or even adjacent to a customer's cable system) and that the value of the benchmark depreciates the further one gets from it.[31] However, he

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[31] We agree with Dr. Teece that Dr. Williams' theory assumes that, to be effective, benchmarks must be local. Dr. Williams' entire clustering theory of antitrust impact is based on the elimination of adjacent cable companies. His assumption that the importance of benchmarks depreciates with distance is unsupported by empirical evidence. As Dr. Teece explains, if "'benchmarking' leads to lower cable rates and the value of the 'benchmark' depreciates with distance, areas near an adjacent cable operator with lower rates should have lower cable rates than areas towards the center of a cluster. Such areas should

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contends, Dr. Williams provides no economic or empirical basis for this assumption. (Teece Cl. Reply Decl. ¶ 134.) Further, if benchmarking only depends on the availability of comparable systems, regardless of distance, Dr. Williams does not explain how the challenged transactions removed enough comparable systems such that the ability to benchmark prices is impaired. (*Id.*)

We agree that Dr. Williams has not provided adequate support for his theory that clustering eliminates benchmarking opportunities for consumers and therefore that elimination of such benchmarks constitutes an anticompetitive effect of clustering that is capable of proof at trial through evidence that is common to the class. The academic support Dr. Williams provides for his benchmarking theory is taken from the literature on the regulation of franchised monopolies such as public utilities. *See* Andrei Shleifer, "A Theory of Yardstick Competition," 16 Rand J. Econ. 319 (1985). Dr. Williams' citations to FCC studies concern the reduction in benchmarking opportunities for regulators in the context of the rates of phone companies. (Williams Decl. ¶ 147.[32]) He cites no empirical evidence of similar benchmark-

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also exhibit prices similar to the adjacent cable operator. Dr. Williams has provided no such empirical evidence and I am unaware of any such evidence." (Teece Cl. Reply Decl. ¶ 141.)

32 He also cites a study from the United Kingdom concerning the reduction in benchmarking opportunity for regulators of water utilities. (Williams Decl. ¶ 148 (citing Simon Cowan, "Competition in the Water Industry," 13 Oxford Rev. Econ. Policy 83, 85 (1997).)

ing behavior by consumers.[33] While he states that the FCC has "discussed the application of benchmark competition in the cable industry," his quote from his source shows that the FCC discussed benchmark competition in terms of local franchise agencies using benchmark competition, not consumers.[34] (*Id.*

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[33] According to Dr. Teece, there is no empirical evidence of the elimination of consumer benchmark competition because it is not a recognized economic theory. He testified,

> I find the whole, this whole argument, your Honor, extremely curious. In the textbooks we recognize actual competition and we recognize potential competition. Now what Dr. Williams has done is create a third category, I believe, for purposes of this case, called benchmark competition. It's true that regulators occasionally benchmark one area against another, but there's no evidence here that there can be competition because if consumers don't know about – even if consumers know about what's going on in another franchise area, they don't have a choice. So it doesn't impact their decisions in any significant way. So this whole notion of elimination of benchmark competition is a new one to me and I believe it doesn't have a proper foundation in antitrust economics and there is no evidence to support that it makes a whit of difference."

(N.T. 10/26/09 at 121:22-122:12.)

[34] Furthermore Dr. Williams' quote from the FCC lacks context. In reviewing the assignment of Adelphia assets to Time Warner, the FCC stated that:

> adjacent service areas can provide a useful benchmark for consumers to compare price and service. . . . We recognized . . . that regulatory efficacy is enhanced when there are a "sufficient number of independent sources of observation available for comparison." We believe that not only regulators, but also consumers, can benefit from the ability to observe how different

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¶ 149.) In the MVPD industry, however, prices are not regulated by local franchise agencies, except for the price of basic cable services, which is not at issue in this case.[35] (Teece Cl. Reply Decl. ¶ 136.) Since Dr. Williams' antitrust impact theory of reduced benchmarking pertains to consumers using cable rates of adjacent cable operators as a basis for comparison, and not regulators, whether local franchise area regulators use the rates of other areas as benchmarks does not support his theory.[36]

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> cable operators are serving proximate areas. **Although benchmarking opportunities may be diminished in certain areas as a result of these transactions, we are unable, based on the record, to quantify any effects on competition that may occur.**

(Ex. D27 ¶ 83 (emphasis added) (internal footnotes omitted).)

35 While contending that benchmarks have been used by both federal and local regulators to regulate cable rates, Dr. Williams recognizes that federal regulators no longer regulate cable rates. (Williams Decl. ¶ 152.) While he cryptically asserts that local franchise agencies "continue to regulate various aspects of the cable industry, including the renewal of incumbents' franchises and competitive entry" (*see id.*), he elides over the undisputed fact that local franchise agencies have no authority to regulate expanded basic cable rates.

36 To the extent there is evidence of consumer benchmarking, it appears to refute rather than support Dr. Williams. He provides an example of Comcast customers comparing their own prices and service quality to other Comcast customers, not to other adjacent cable providers. (Williams Decl. ¶ 159.) His other example pertains to Comcast customers comparing their own service quality to that received by RCN and Verizon FiOS customers, not adjacent MVPDs. (*Id.* ¶ 160.) As Dr. Teece notes, to the extent that RCN and FiOS constitute benchmarks, they remain in the Philadelphia DMA despite the alleged anti-

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The survey Dr. Williams conducted to gauge consumer benchmarking behavior is also problematic. A research group conducted a survey of 400 respondents in each of the DMAs for Los Angeles, New York, Philadelphia, and Washington. The results showed that cable customers in the Philadelphia DMA reported only a 12% awareness of alternative cable providers versus 18% for Los Angeles, 39% for New York, and 42% for Washington. Dr. Williams opines that because of the lower concentration of cable system ownership in the non-Philadelphia areas, the survey suggests that the lower awareness of **benchmarking information** possessed by cable subscribers in the Philadelphia DMA reflects a reduction in **benchmark competition**. (Williams Decl. ¶ 155.) However, Dr. Williams does not explain in his report how the lack of knowledge of other cable companies necessarily establishes a reduction in benchmark competition. Nor does the survey provide empirical evidence of the level of consumer benchmarking behavior both before and after Comcast's clustering activity began, to examine any reduction due to clustering. He testified on cross-examination that, other than his survey, he conducted no empirical study showing that consumer benchmarking behavior is reduced by clustering, and conceded that Comcast customers still could and did benchmark against Comcast rates charged in other areas. (N.T. 10/15/2009 at 94:6-14, 17-25; 95:1-6.)

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competitive effects of clustering. (Teece Cl. Reply Decl. ¶ 137.) We find that these examples contradict Dr. Williams' contention that only adjacent cable operators serve as valuable benchmarks for Comcast customers.

Finally, Dr. Williams' reliance on internal Comcast documents in which Comcast executives compare Comcast rates to immediately adjacent cable operators, to others in the region, and also with national benchmarks (*see* Williams Decl. ¶ 161), does not provide common evidence supporting his consumer benchmarking theory of antitrust impact. According to Dr. Teece, it is common for any firm to track general industry information, including the prices that other firms charge. (Teece Cl. Reply Decl. ¶ 138.) More importantly, these documents are only evidence that **Comcast itself** tracks the prices of other cable firms, not that consumers do so. Also, the documentary evidence, comparing regional and national benchmarks, appears to conflict with Dr. Williams' premise that only adjacent cable operators can provide consumer benchmarks.

Accordingly, we conclude that the Class has not demonstrated that the alleged anticompetitive effect of clustering on consumer benchmarking is capable of proof at trial through common evidence.

4. Clustering and its effects on bargaining power

As part of his discussion of the geographic market, Dr. Williams attempted to demonstrate how increasing the number of cable systems or clustering its cable systems in a DMA can increase an MSO's bargaining power with programming content providers (such as television networks) and lead to higher profits and higher rates. He opined that

> swaps and acquisitions can increase the bargaining power of a cable operator relative to the bargaining power of a network. This occurs because the swaps and acquisitions have the effect of decreasing the percentage of the

> cable operator's revenues attributable to any individual network and increasing the percentage of any individual network's revenues attributable to the cable operator. As a consequence of this enhanced bargaining power, the cable operator becomes more patient and more willing to break off negotiations relative to an individual network.

(Williams Decl. ¶ 100.) As a result, he continues,

> when bargaining power shifts to the cable operator, offers that previously would have been rejected by the network will now be accepted (lowering the cable operator's costs of acquiring programming from the network), and therefore a larger share of the gains from trade in the negotiation will accrue to the cable operator. (In a competitive market, these cost reductions would be passed through to subscribers in the form of lower prices. As discussed below, the FCC has determined that any programming cost reductions that may be associated with clustering have not been passed through to consumers.) Consequently, an immediate implication of an increase in the cable operator's bargaining power is that its profits are expected to increase. Cable rates also can increase as a consequence of an increase in the cable operator's bargaining power.

(*Id.* ¶ 102.[37])

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[37] We note that in the last sentence of Williams' conclusion that he states only that cable rates "can" increase as a consequence of an increase in the cable operator's bargaining power, and not that he has shown that they actually do. Merely as-

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Dr. Williams supports his bargaining theory of antitrust impact in his clustering model. He theorizes that when a cable operator increases its footprint by increasing the number of franchise areas it operates or when it increases the clustering of its franchises (1) a cable network it negotiates with may become relatively less patient during their negotiations and relatively less likely to break off their negotiations, and (2) the cable operator may become relatively more patient and relatively more likely to break off their negotiations. (*Id.* ¶ 210.) Where a cable operator swaps a geographically distant franchise for a local franchise, one result might be that the cable operator negotiates over a larger share of its revenue with local networks because it now owns more franchises involved with these local networks. At the same time however, the swap will also increase the fraction of the local networks' revenues involved in the negotiations with the cable operator. To the extent that the cable operator's total revenues are large relative to its revenues involved in local network negotiations, the increase in the fraction of the operator's revenues involved in negotiations with any one local network will be small relative to the increase in the fraction of the local network's revenues that are involved in the negotiations. Consequently, while both the operator and local networks may become less patient during their negotiations, an operator whose total revenues are large relative to its revenues generated through any single local network

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serting that conduct can cause antitrust impact is insufficient. *See Hydrogen Peroxide*, 552 F.3d at 318 (stating that the movant must do more than "assur[e] . . . the court that it intends or plans to meet the requirements" of Rule 23).

will likely become relatively more patient than any of the local networks with whom it negotiates. (*Id.* ¶ 215.) Therefore, Williams asserts, clustering alone can lead the cable operator to become relatively more patient and relatively more likely to break off negotiations with any network, and can lead local networks to become relatively less patient and relatively less likely to break off negotiations. Given any one of these changes, the bargaining model predicts that a larger share of the surplus will go to the cable operator as its franchises become more clustered. (*Id.* ¶ 216 (citing Ken Binmore, Ariel Rubinstein and Asher Wolinsky "The Nash Bargaining Solution in Economic Modeling," 17 Rand J. Econ. 176 (1986).) Dr. Williams concludes that by either (1) increasing its footprint or (2) by increasing the clustering of its franchises holding its footprint constant, a cable operator can increase its bargaining power over a cable network. (*Id.* ¶ 217.)

From these premises, Williams attempts to show that increased bargaining power on the part of a clustered cable operator leads to both higher profits and higher consumer rates. He assumes two scenarios: in the first, the cable network has all of the bargaining power and, as such, can make the cable operator a take-it-or-leave-it offer. In the second, the cable operator has all of the bargaining power and can make the network a take-it-or-leave-it offer. (*Id.* ¶ 219.) Williams then attempts to demonstrate that both the cable operator's profits and average cable rates are higher when the cable operator has all of the bargaining power than when it has none. To understand why a shift in bargaining power to the cable operator increases subscription rates, he analyzes the gains from trade between the network and the operator.

Dr. Williams theorizes that the gains from trade between the network and the operator depend upon information the cable operator does not have, namely whether the terms secured by the network with its advertisers are favorable or unfavorable for the network, and advances the following argument:

1. Because the gains from trade between the operator and the network are highest when the network's advertising rates are relatively high, the cable operator must be wary of the network's incentive to falsely claim that its advertising rates are relatively low, a ploy that can allow the network to hide advertising revenue for itself.

2. Consequently, any agreement that the operator and network might be expected to reach when the network's advertising rates are relatively low cannot, when its advertising rates are in fact relatively high, be more attractive to the network than the agreement they are expected to reach when the advertising rates are relatively high; otherwise the network will behave as if its advertising rates were relatively low even when they are not.

3. One way for the operator to ensure honesty from the network during negotiations is to insist on a reduction in the number of households receiving the network's programming when the network claims its advertising rates are relatively low, because such reductions are more costly for the network to accept when its advertising rates are relatively high than when they are relatively low.

4. To the extent that the cable operator has relatively more bargaining power, it will extract additional surplus from the network, both when the network's advertising rates are relatively low

and when they are relatively high. But because there is less surplus to extract when the network's advertising rates are relatively low, eventually the additional surplus will be extracted only when the advertising rates are relatively high.

5. Consequently, all else equal, the incentives for the network to falsely claim that its advertising rates are relatively low generally increase with the surplus the cable operator attempts to extract.

6. But all else is not equal. When the cable operator has more bargaining power, it can increase its surplus while maintaining the network's incentives to honestly reveal when its advertising rates are relatively high. The cable operator can do this by insisting on further reductions in the number of subscribers receiving the network's programming when the network claims its advertising rates are relatively low.

7. As a result, Williams concludes, the more bargaining power the operator has, the fewer subscribers there will be of the network's programming when the network's advertising terms are relatively low. Because profit maximization by the cable operator implies that fewer subscribers are obtained by charging higher monthly subscription rates, Williams claims he has demonstrated that the more bargaining power the operator has, the higher will be the cable operator's subscription rates when the cable operator does not know with certainty the advertising rates paid by advertisers to the network.

(*Id.* ¶¶ 243-45.)

Dr. Williams' bargaining power model has been criticized by both Dr. Teece and Dr. Chipty. Dr. Teece opines that Dr. Williams' model is based on untested and unverified assumptions. (Teece Cl. Reply Decl. ¶ 155.) He contends that Dr. Williams' assumptions regarding uncertainties about the network's advertising revenue, which are the crux of the model's basis for asserting that **lower** programming costs will lead to **higher** prices to cable subscribers, is wholly unsupported. Dr. Teece labels Dr. Williams' result "perverse and unrealistic," as well as contrary to the assertion contained in Williams' discussion of the effect of clustering on overbuilding, where he claimed that **lower** costs will lead to **lower** prices for cable customers not passed by an overbuilder. (Teece Reply Decl. ¶ 155 (citing Williams Decl. ¶ 94).)[38]

Dr. Chipty opines that, contrary to Williams' conclusions, bargaining power, if it exists, will serve to benefit consumers through a reduction in Comcast's programming costs, which will be passed on to consumers in the form of either lower prices or improved service. (Chipty Cl. Reply Decl. ¶ 9.c.i.) Bargaining power, Dr. Chipty explains, refers to the leverage in a bilateral bargaining negotiation between a buyer and seller. It is widely believed in the cable television industry that as MSOs become larger and more clustered, they have gained greater power to extract favorable pricing and other terms from unaffiliated suppliers of video programming. She contends, however, that it is far from clear how this

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38 Dr. Teece also notes that, once confronted with criticisms to his model, Dr. Williams offered no empirical evidence in his subsequently filed Reply Declaration to support his theoretical model. (Teece Supp. Cl. Decl. ¶ 58.)

phenomenon, even if true, has created any competitive harm to Comcast customers in the Philadelphia Cluster due to Comcast's clustering activity. (Chipty Cl. Reply Decl. ¶ 45.)

First, Dr. Chipty reasons that, in most cases, an MSO's bargaining power is likely to be related to the size of the MSO's total subscriber base, rather than its regional size, as reflected by how those subscribers might be clustered geographically.[39] (*Id.*) Second, enhanced MSO bargaining power with respect to program service is, she opines, an unlikely source of harm to cable subscribers. To the contrary, the most likely consequence of MSO bargaining power is lower prices to consumers, in the form of some pass through of cost savings. (*Id.* ¶ 46.) She does not disagree that greater bargaining power leads to greater profits for the MSO; however, she agrees with Dr. Teece that the claim that greater bargaining power is a factor "allowing the cable company to increase its prices" is highly counterintuitive, rests entirely on the particular assumptions adopted by Dr. Williams, and is unlikely to be particularly robust to even relatively minor changes in these assumptions. She notes that, perhaps for this reason, Dr. Williams himself is more modest in his claims about his model, concluding in the main body of his report only that he demonstrates that "[c]able rates also can increase as a consequence of an increase in the cable operator's bargaining power." (*Id.* (quoting Williams Decl. ¶ 102).)

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39 Dr. Chipty does concede that the way an MSO's subscriber base is clustered is likely to be relevant to negotiations between MSOs and local or regional programmers, while contending that it has no relevance to negotiations with national programmers. (Chipty Cl. Reply Decl. ¶ 45.)

We find that the criticisms of Dr. Williams' bargaining power model are aptly drawn. His initial assumption, that cable operators must negotiate with content providers without any knowledge of whether the network's advertizing rates are favorable or unfavorable for the network, is wholly unsupported. His model also appears to imply that this knowledge deficit is unilateral; the model does not consider the possibility that networks may not be fully informed about a cable operator's profitability within its cluster. Dr. Williams' assumption that a cable operator will seek to ensure honesty from a network by insisting on a reduction in the number of households receiving the network's programming when the network claims its advertising rates are relatively low is also unsupported by any evidence that cable operators actually engage in this negotiating conduct. Finally, Dr. Williams' theoretical conclusion that the more bargaining power the operator has, the fewer subscribers there will be of the network's programming when the network's advertising terms are relatively low is unsupported by any empirical evidence.[40] For these reasons, we conclude that the

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40 The only authorities Dr. Williams cites to support his bargaining theory and model are the Binmore, Rubinstein and Wolinsky article, which concerns only the first part of the Williams model, and the 13 Annual FCC Report on the status of competition in the MVPD market. Dr. Williams quotes from the 13 Annual Report's discussion of the impact of clustering on overbuilding, that "clustering can present a barrier to entry for the most likely potential overbuilder (i.e., an adjacent cable operator). . . . [W]hile clustering may help reduce programming costs and other expenses, the Commission's findings reflect that these lower costs are not being passed along to subscribers in the form of lower monthly rates." (Ex. D37 ¶ 180.) The FCC's finding that lower programming costs are not being passed

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Class has not met its burden to demonstrate that the anticompetitive effect of clustering on bargaining power is capable of proof at trial through evidence that is common to the class.

VI. COMMON METHODOLOGY FOR DETERMINING DAMAGES

A. Dr. McClave's Report

In his report, the Class's damages expert Dr. James T. McClave opines, based on various studies, that prices in areas of effective competition prove to be consistently and substantially less than the prices paid by class members in the Philadelphia market. (McClave Decl. at 15.) He claims that the results of his analysis are consistent with the Plaintiffs' allegations that the alleged anticompetitive acts had the effect of elevating prices above competitive levels over the entire Philadelphia market and throughout the class period. He states that his analyses establish that the impact of Comcast's anticompetitive conduct was class-wide, since his econometric analysis shows that prices were elevated above competi-

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along to subscribers does not provide empirical evidence supporting Williams' bargaining theory. The FCC reported that the lower costs associated with clustering were possibly due to the fact that clustering makes cable operators more effective competitors **to LECs**, not better negotiators with content providers, and that clustering can provide a means of improving efficiency, reducing costs, and attracting increased advertising. (*Id.*) Other than its reference to "lower costs," which is not detailed, the Report does not shed light on Williams' assertion that clustering enhances a cable operator's ability to negotiate with content providers. We read this section of the report only to refer to the competitive advantages of cable operators and LECs.

tive levels across all class members and for the entire time period. Based on his econometric analysis, he opines that "a conservative estimate of the total economic damages suffered by the class plaintiffs is $875,576,662." (*Id.*)

McClave conducted his analysis by estimating "benchmark" prices against which to compare actual prices charged during the relevant period in the Philadelphia DMA. "Benchmark prices, also referred to as 'but-for' prices, are prices that are unaffected by the alleged anticompetitive conduct, and, as such, can be used to determine whether the conduct did have the effect of elevating prices, and if so, to what extent." (*Id.* at 3.) He calculated his benchmark prices by creating a database of Comcast cable prices for expanded basic cable for franchises throughout the United States. (*Id.* at 4.) He then applied standard econometric methodology to the benchmark sample in order to calculate the benchmark prices to be compared to the Philadelphia market prices. He estimated prices based on a multiple regression model of the benchmark data relating the prices in the benchmark sample to several factors found to influence price. He claims "this analysis tells us what factors influence a competitive price for this video service in circumstances reasonably comparable to those presented here 'but for' the challenged anticompetitive conduct." (*Id.*)

He reports that his objective was to select a benchmark against which to compare the actual Philadelphia prices by finding a sample of counties that represented a level of competition similar to that which Comcast likely would have faced in the Philadelphia DMA absent its alleged anticompetitive conduct. He therefore identified counties that re-

flected competitive characteristics he would expect to see in the Philadelphia DMA absent the conduct challenged by the Class. Because the Class alleged that the effects of Comcast's anticompetitive conduct were to deter the entry and constrain the penetration of competitors in the Philadelphia market, including overbuilders, other cable providers, and DBS providers, he focused on Comcast's level of subscriber penetration, the level of DBS penetration in the market, and the presence of overbuilders in the market. (*Id.* at 5.) He included counties in his benchmark that: (1) reflected Comcast's alleged national subscriber penetration rate of 40% (which was its approximate midpoint penetration rate in the Philadelphia DMA between its 20% rate in 1998 and its 60% rate in 2008); and (2) were in DMAs where the penetration level for alternative delivery systems ("ADS," defined as DBS, and to a much smaller extent, master antenna systems, and multipoint distribution systems) was at or above the national average of ADS penetration rates in Comcast markets. (*Id.* at 6-7.) Once a county qualified as a benchmark for a particular year by satisfying these two "screens," it was examined to determine whether or not it had been significantly overbuilt, defined as having two or more wireline companies, each having at least 15% of cable subscribers in the overbuilt area. (*Id.* at 7.) If the percentage was greater than 15%, then he identified the county as overbuilt. (*Id.* at 7-8.)

McClave used the benchmark county data to estimate "but-for" prices to compare with actual prices in the Philadelphia DMA using a multiple regression analysis. McClave opines that

> Multiple regression analysis enables one to estimate the relationship between price and

> other factors found to influence price in the benchmark data, and then to use that relationship to estimate prices in the Philadelphia market as if it shared the properties of the benchmark sample; that is, as if Comcast's subscribers continued to represent less than 40% of households, as if the ADS penetration were at least average, and, in at least five counties, as if Comcast faced competition, as described above.

(*Id.* at 8.) In his comparison, McClave "assumed that only the five counties that RCN indicated it planned to enter as an overbuilder would have been overbuilt: Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties. The model indicates that the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination." (*Id.*) He found that Philadelphia DMA market prices were elevated above the competitive prices by between 11% and 17% over the relevant period. (*Id.*) He then compared his results to FCC surveys of prices and concluded that his model was a conservative estimate of the price differentiation. (*Id.* at 9-13.) He calculated the $875,576,662 amount by which class members were overcharged by applying the appropriate overcharge percentage to the appropriate relevant revenue obtained by Comcast for the expanded basic service in Philadelphia for the class period. (*Id.* at 13.)

B. Comcast's Experts' Rebuttal

Comcast responds that Dr. McClave's model is unsuitable, from an economic perspective, for estimating alleged damages on a class-wide basis because (1) his damages analysis makes assumptions regarding competitive conditions that would have ex-

isted but for the challenged conduct that are unreasonable and inconsistent with the economic evidence, and (2) his analysis does not and cannot take into account relevant differences across members of the class.

1. Whether McClave's use of benchmark counties is appropriate

According to Dr. Teece, Dr. McClave does not explain how his screens of counties representing (1) a Comcast penetration rate of no more than 40% and (2) an ADS penetration rate at or above the national average for other Comcast markets, relate to any of the allegations in the Third Amended Complaint. Dr. Teece assumes that the criteria relate to Dr. Singer's theory that foreclosure of regional sports programming impeded DBS penetration, but opines that Dr. McClave's benchmark counties are not a reliable basis for estimating the alleged impact of Comcast's challenged conduct because there is no economic basis for choosing counties with greater DBS penetration than the national average. Dr. Teece faults Dr. McClave for not identifying counties at a level similar to that which would have occurred in the Philadelphia DMA in the "but-for" world. He also faults McClave for not considering other factors that likely affect DBS penetration in choosing his benchmark counties. (Teece Class Decl. ¶¶ 167-68.)

Dr. Teece specifically takes issue with Dr. McClave's choice of the national DBS penetration rate as one of the screens for his model. He asks why, if the model is designed to forecast the competitive conditions in the Philadelphia DMA absent the alleged anticompetitive conduct, McClave did not use the far lower prediction of DBS penetration stated by

Dr. Singer and adopted by Dr. Williams.[41] According to Dr. Singer, DBS penetration in the Philadelphia DMA would have been only 15.4% in 2005 (compared to DBS's actual penetration of 9.4%) if DBS providers had access to CSN Philadelphia, not the far higher national average. (*Id.* ¶ 169.) Dr. Chipty also argues that using the national average of DBS penetration rates in other Comcast markets is not appropriate.[42]

Dr. McClave did not specifically address this critique in his subsequent expert submissions. We

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41 Dr. Teece testified:

> Now, I can speak a little bit more specifically to what Dr. McClave did. As I said, he started off with his benchmarks and those benchmarks though, your Honor, are not but-for worlds that were specified by Dr. Williams. They are basically, in my view, arbitrarily chosen and they don't link to the theories put forward on the liabilities side. For instance, the notion that somehow rather DBS penetration should be at the national level, even Dr. Singer's predictions for the Philadelphia DMA don't even show that. So, I find that that is a serious flaw. It was before and what's been done here.

(N.T. 10/26/09 at 137:9-19.)

42 Dr. Chipty states that there are only two areas in the country where the incumbent cable operator (1) owns the regional sports network (Philadelphia and San Diego); (2) has the right under FCC regulations to maintain cable exclusivity; and (3) has chosen to do so. (Chipty Reply Decl. ¶ 87.) Rather than acknowledge that the Philadelphia situation is only comparable to San Diego, Dr. McClave's study removes all counties where DBS penetration is below the national average, whatever the reason. Thus, Chipty concludes, McClave has inappropriately removed counties that have low DBS penetration for reasons that have nothing to do with DBS access to regional sports programming. (*Id.*)

cannot agree, however, that this critique is aptly drawn. There is no disconnect between Dr. McClave's choice of the national DBS penetration rate of Comcast markets, rather than the predicted DBS penetration rate for the Philadelphia market absent the alleged anticompetitive conduct. Dr. Singer's theory that foreclosure of regional sports programming kept the DBS penetration rate in Philadelphia below its predicted level – as opposed to the much higher national average – represents an entirely different concept from the one used by Dr. McClave. McClave used his national average DBS penetration screen as a descriptor of typical competitive market conditions. The fact that DBS penetration would not have reached the level of national average for Comcast markets in the Philadelphia DMA does not mean that national average DBS penetration, combined with median Comcast share during the class period, do not demonstrate a typical competitive market. Typical competitive markets that would satisfy Dr. McClave's benchmark screens do not have Philadelphia's predicted DBS penetration; by definition they have national average DBS penetration levels for Comcast markets.

With regard to the selection of the less-than-40% Comcast penetration rate screen, Dr. Chipty claims that McClave ignores the fact that, as late as 1999, Comcast was only present in a handful of counties in the DMA, and its overall share of subscribers was only 25%. We find that this criticism is not supported by the record. Chipty chooses 1999 data to attack McClave's use of the less-than-40% figure, but 1999 is only one year after McClave's start point of 1998, when he acknowledges Comcast's share was 20%. That figure grew to 60% over the next ten years. If Dr. Chipty wanted to show that the 40% figure was

an overestimate, her assertion would have been stronger if she could have shown that data from the midpoint of the time frame, 2003, or the average rate over the entire time period, did not correspond to the 40% figure. Dr. Chipty makes no such attempt.[43]

2. McClave's omission of population density from the benchmark model

Dr. Chipty opines that McClave's model overestimates damages because McClave fails to account for differences in demographic characteristics between benchmark counties and Philadelphia, including, for example, population density, and percentage of rental units and detached homes. (Chipty Reply Cl. Decl. ¶ 88.) Dr. McClave stated in his report that

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[43] Dr. Teece also attacks McClave's choice of the less-than-40% penetration rate sign to identify benchmark counties, asserting that it bears no apparent relationship to the Class's claim that the challenged transactions were anticompetitive. He stated that, while Dr. Williams bases his opinion that clustering was anticompetitive on the ground that clustering minimized boundaries that Comcast shared with other MSOs that could possibly become overbuilders in adjacent areas, Dr. McClave makes no attempt to estimate the likelihood of such entry by adjacent cable operators or the effect that such entry would have had on cable prices. Thus, Dr. Teece suggests, Dr. McClave's benchmark counties methodology bears no relation to the Class's allegation that the swap transactions constituted unlawful horizontal restraint on competition. (Teece Class Decl. ¶¶ 174-75.) We reject this criticism. McClave's use of the less-than-40% Comcast share screen is supported by the evidence that it represents Comcast's approximate share of the Philadelphia DMA at the midpoint of the class period. McClave chose this screen because it allowed for some growth during the class period, but allowed him to focus on markets where Comcast was less likely to have market power than it acquired in the Philadelphia market due to the alleged anticompetitive clustering conduct. (McClave Decl. at 6.)

he considered using population density, as well as the number of households, as additional cost variables, with higher levels expected to decrease per subscriber costs, but when included in the model these factors

> were either wrong signed (having positive associations with price) or statistically insignificant. This may be attributable to their high degree of correlation with the income factor (in statistical parlance, "multicollinearity"), or residual anti-competitive effects that remain in the benchmark, or some combination of both. I therefore did not include them in the final model specification.

(McClave Decl. App'x A at 1 n.3.) Chipty criticizes this decision because, from "an industry viewpoint, these variables are widely thought to capture both supply and demand side features of the market, and as such there is no a priori expectation about the direction of effect (or sign on the coefficient). . . ."[44] (Chipty Reply Cl. Decl. ¶ 93.)

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[44] We note that the GAO, in studying wire-based competition from broadband service providers ("BSPs") stated that "[s]ome of the rate impacts that we found may be due to factors other than the BSP entry, such as population density." (GAO 2004 Report at 5.) However, the report goes on to state that "although [a]ll 6 of the BSPs we interviewed mentioned the size of the market as a key factor that they considered in market selection. . . [o]nly 1 BSP focused its business development toward larger cities. . . . Five BSPs built new infrastructure in medium and smaller cities. They told us they took this approach, in part, because they recognized how difficult it would be to meet construction requirements in a large city." *Id.* at 17-18. "As a result, nationwide, BSPs serve only about 1 percent of the subscription television market. . . ." (*Id.* at 28.)

In response to Dr. Chipty's criticism, McClave states that population density, which is a demographic variable, is positively correlated with income, a variable he had already included in his model. He opines that including population density leads to a result that is unreliable and counter-intuitive to its relationship to price. (McClave Rebuttal Decl. at 18.) McClave criticizes Chipty's inclusion of the variable in her competing damage models[45] because her population density explanatory variable coefficient has a counter-intuitive positive sign, particularly when median household income has already been included. He reasons that since clustering tends to occur in higher income areas, it may also be capturing some clustering effects. As Comcast itself has argued, and as has appeared in the published literature, higher population density results in lower costs per subscriber. Thus, he would expect a negative relationship between price and population density, particularly with median household income already accounting for demand's effect on price. He contends that the addition of population density in Dr. Chipty's models only masks the effects of anti-competitive influences on price.[46] (*Id.* at 30-31.)[47]

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45 We note that Dr. Chipty has specified numerous models to support her own conclusions on the issue of antitrust impact as well as to impeach Dr. McClave's conclusions. Several of Dr. Chipty's models are variations on the McClave model incorporating alternate variables. Others use different data sources. We do not specifically address each of Dr. Chipty's models, but rather focus on her major criticisms of Dr. McClave's results.

46 Dr. McClave similarly testified:

> Q And did you look at the issue of population density as a possible variable?

[Footnote continued on next page]

[Footnote continued from previous page]

A I would say [] population density has been probably the most discussed variable between experts in this case, that there is. I certainly did look at it.

Q Did you determine that it should not be used?

A I did.

Q Why did you determine it should not be used?

A There were basically three reasons. The first several are purely statistical. When population density, when I put it into the model to see whether it was important or not, I had an a priori [] understanding that from, for example, Comcast's submissions to the FCC, that in places where there were lots of people, efficiencies should exist and costs should be less than where there are few people. And so, my a priori expectation, which econometricians have when they're putting models together, was that the relationship between population density and price would be inverse, a negative one. That is, as population density went up, costs would go down and so price would go down.

Q Let me stop you for a second.

A Sure.

Q You talk about having an a priori intuition and expectation. Is that unusual for statisticians, econometricians to approach specifying a model with a priori expectations?

A No, it's not unusual at all. In fact, there are econometrics texts that say that it's something akin to moral obligation for an econometrician to establish such hypotheses and expectations. And then, if the data don't live up to that, to try to understand why.

Q So, now, I interrupted you and I'm sorry, Dr. McClave. Please go on and explain to the Judge why you didn't include the population density?

A When I added population density to the model, it had the opposite sign, it had a positive sign, indicating that prices were going up as population density increased. The concern I had, when I saw that, was number one, it didn't conform to what I ex-

[Footnote continued on next page]

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pected. And number two, I was concerned that one of the reasons that that might have been the case was the challenged behavior in this case. In other words, the cluster. And so, the concern I had about leaving population density in the model is, number one, it didn't conform to economic expectation. And number two, it may be tainted by the very behavior that I am assuming was illegal for the purpose of my analysis, was anti-competitive. And then finally, the last reason, your Honor, was the benchmark and we're going to get into this, I know. But the benchmark that I was using in order to estimate prices into Philadelphia, turned out not to have – turned out that the population density in Philadelphia was somewhat greater than that in most of the benchmark. And so, we call that needing to extrapolate in statistics and it's something we try to avoid. And so, I preferred the median income variable, because median income was a variable that captured all of Philadelphia, that is my benchmark median incomes range captured all the median income for the counties in this area and Philadelphia. And it had the expected sign. Namely, as median income went up, it had a positive relationship with price. Which again, from my reading and my own expectations of the work in this industry, median income, higher median income probably is correlated or a proxy for more demand for cable. And also, higher median income probably means that the cable companies are having to pay more for their labor. So there are several reasons why median income, to me, made much more sense than population density and that's why it ended up in my model and population density didn't. It had nothing to do, Mr. Goldberg, with whether the damages were higher or lower.

(N.T. 10/13/09 at 58:14-61:7.)

We find that Dr. McClave's decision not to include population density is well supported. In addition to his report's explanations and his testimony, he shows that population density is improper by looking at what happens when Dr. Chipty includes demographic variables like population density in her

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47 Dr. McClave also opines that the inclusion of population density in Dr. Chipty's competing regression models violates an important statistical principle:

> As Dr. Chipty points out, Philadelphia's population density is significantly greater than in the benchmark. Importantly, the maximum population density in the benchmark is 3,600 population per square mile, while Philadelphia's maximum is more than 11,000 per square mile. This is a consequence of defining a benchmark that is relatively free of clustering, but creates a statistical problem when included in Dr. Chipty's multiple regression models. The problem is that when using the models to estimate the Philadelphia "but for" prices, the models are being used to extrapolate far outside the range of values used to estimate the benchmark. That is, the models are used to estimate prices for counties with population density more than 300% larger than the highest population density in the benchmark. This violates a basic statistical principle of multiple regression analysis that advises against such extrapolation, since it can result in unreliable estimates. This problem is avoided by using median income as the demand factor in the models (as I did), since all counties in the Philadelphia market have median incomes that are within the range of the benchmark sample's median incomes.

(McClave Rebuttal Decl. at 31.) He concludes that, as a result of including population density, Dr. Chipty's models produce unreliable estimates of "but-for" prices in the Philadelphia market, and therefore result in unreliable estimates of economic damages there.

regression models, while also including an income variable. For example, because of demographic variables Dr. Chipty's model shows that, other factors equal, markets with a higher percentage of white non-Hispanic population pay lower cable rates. More importantly, her population density variable shows as positive and statistically significant in one model, and negative and statistically significant in another. (*Id.* at 19; Ex. P86.)

McClave's decision was also supported by FCC and GAO studies which included population density, but found that the variable was not shown to be statistically significant.[48] (Ex. D2 at 81; Ex. D3 at 24,

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[48] When Dr. McClave used the term "not statistically significant," we asked him:

THE COURT: What does that mean, not statistically significant? Does that mean that if we lifted that variable out completely, population density, the result wouldn't be different to any significant –

THE WITNESS: Certainly in terms of using it to predict prices, yes. What it literally means, your Honor, you can't reject the hypothesis that the true coefficient, the true weight is zero, that it's in there, but explaining nothing more than random variation.

THE COURT: Okay. That's the engineering aspect of it. A guy like me from the street, what am I to conclude with respect to that? Am I to conclude that although population density was included by the GAO in 2002 and 2003, the result would have been the same had it not been included? When I say the same, I mean no significant difference.

THE WITNESS: Right. That's right.

THE COURT: I can conclude that?

[Footnote continued on next page]

32; Ex. D13 at 47.) In the FCC study, two regression models examining cable prices in overbuilt markets showed that density and density squared had a coefficient of zero and a t-statistic ranging from only 0.03 to 0.87.[49] (Ex. D2 at 81.) In the GAO studies, regression models from 2002 and 2005 examining the influence of various factors on DBS penetration rates showed that population density had coefficients ranging from -0.0973 to 0.0015 and t-statistics ranging from only 0.0001 to 0.8090. While Dr. McClave conceded on cross-examination that the FCC and GAO had indeed included the variable,[50] it was not statistically significant, and accordingly we find that

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THE WITNESS: Absolutely.

(N.T. 10/13/09 at 19:25-20:17.)

[49] The t-statistic, or test statistic, tests whether a variable is statistically significant, i.e., whether it is "just random from the data. As opposed to a real relationship, something that's indicated to be statistically significant. So, there are ways we measure that, they're called T-statistics." (N.T. 10/13/09 at 98:9-12.)

[50] He testified that the FCC's purpose in specifying its regression model was different from his purpose: "These FCC studies in my view, and I think you'll find it in the studies, are exploratory. What is it that's affecting cable prices? They don't go to the next step of saying, and I'm going to use this model to estimate cable prices in some region." N.T. 10/13/09 at 10:23-11:2. He added, "If [his model demonstrates a] wrong sign, then one thing I have to think about that the FCC doesn't is what's the reason for that? I concluded that it may well be, given all the studies about clustering and what Mr. Korpus just asked me about, that it's because of the alleged anti-competitive conduct." (N.T. 10/13/09 at 11:17-22.)

its inclusion in the governmental studies does not impeach Dr. McClave's decision to omit it.[51]

3. McClave's use of list prices rather than actual prices

In creating his damages model, Dr. McClave compared list prices for expanded basic cable in the Philadelphia DMA with list prices for expanded basic cable in the benchmark counties.[52] Dr. Chipty criticizes McClave's model because it does not take into account the significant amounts of promotions and discounts offered to Comcast customers that effectively lower their price for service below the list price that McClave uses in his model. (Chipty Reply Cl. Decl. ¶ 92.) His justification for using list prices, as opposed to discounted prices offered by Comcast for short periods to customers that, for example, package video, internet and cable services into Comcast's Triple Play plan, is that more than 80% of Comcast's customers continue to pay its list prices for expanded

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51 At the evidentiary hearing, the Class introduced an exhibit comparing the McClave damages model with various iterations either suggested by Dr. Chipty's criticisms or models that Dr. Chipty herself specified. McClave's model with the population density variable added still reflected damages in excess of $655 million. (Ex. P82.)

52 McClave testified:

> Q Now, in your model, you used the Comcast list price, right?
> A That was my attempt, yes.
> Q And the price you used to work out the overcharge does not take any customer discounts into account, right?
> A The comparison is list price to list price.

(N.T. 10/13/09 at 52:5-10.)

basic cable. (N.T. 10/13/09 at 53:9-10.) Further, discounts are reductions from list prices, and are only offered for temporary periods, after which the price returns to the list price. (*Id.* at 55:18-21.) McClave testified that:

> So, to get a true picture of price and what was happening to the price, we felt as all of these papers that he cited today, also feel that the only way you're going to get a true picture of price is list price. And there is an assumption, your Honor and I've stated it many times, that these discounts are limited in nature and that they're off list price. So that, if the list price were elevated, the discount prices would have been elevated. There is an assumption in my analysis to that affect [sic].

(*Id.* at 55:15-23.)[53]

To show why her criticism of using list prices affects whether McClave's model is common evidence of antitrust impact, Dr. Chipty specified several regression models of her own. In one model, she reworked McClave's model, allegedly adding as addi-

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53 The fact that discounts are not percentage discounts off of list prices does not change the fact that they are discounts from list prices. While Comcast attempted to impeach Dr. McClave by pointing to the fact that its Triple Play price is a flat price, rather than a percentage discount off list, we find this distinction insignificant. It was undisputed that once a discount program ends, the subscriber's fee for expanded basic cable service returns to list price, barring some other discount they are able to negotiate. Even though the Triple Play price is not a percentage discount, it remains that the program is of limited duration and the subscriber eventually will pay Comcast's list price when the promotional period ends.

tional factors (1) discounts off list price and (2) population density. (Chipty Reply Cl. Decl. ¶ 92.) To correct for discounts, Chipty substituted a weighted average price for list price.[54] (*Id.*) She claims that the introduction of these two additional pieces of information more than halved the magnitude of McClave's findings. (*Id.* ¶ 94.) In some counties, Chipty's model finds that actual prices are less than the "but-for" price that McClave's model predicts. (*Id.* ¶ 95.) Thus, she opines that McClave's model, as modified, predicts negative damages. For 2007, her modified model finds that 12 of the 16 counties chosen by McClave would have negative damages, and for 2008 all but one had negative damages. Over the entire scope of the modified model, negative damages are predicted for over one-third of the county-years.[55] (*Id.* ¶ 96.) Chipty opines that this information serves to expose the unreliability of McClave's methodology for measuring class-wide impact and damages.

We find that this rebuttal model suffers significant flaws. Dr. Chipty's use of weighted average prices (regardless of their source), rather than list prices in a model to estimate damages, is inappropri-

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[54] Dr. Chipty took her data from the 2008 "Television and Cable Factbook" published by Warren Communications News. (Chipty Reply Decl. at 3 n.9.) Dr. McClave criticized Chipty for using this data, which he asserted was not reliably accurate. (McClave Rebuttal Decl. at 4.) While not accepting McClave's criticism, she nonetheless reworked the model using Comcast billing data rather than Factbook data. (Chipty Supp. Decl. ¶¶ 17-18.) She asserts that using the same Comcast billing data that Dr. McClave used yielded the same results. (*Id.*)

[55] Nonetheless, this model does report positive damages over the class period. (Ex. P82.)

ate. The model Dr. McClave specified is designed to determine the difference between the list price of expanded basic cable prices in the Philadelphia DMA and the list prices in the benchmark counties. He then uses that difference in list price in a formula he applies to Comcast's revenues to determine the Class's alleged damages. Any discount from list price that Comcast subscribers receive is not accounted for in his model, but rather in his formula when the anticompetitive overcharge is multiplied by Comcast's relevant revenues.[56] Dr. Chipty's use of

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56 McClave testified:

> Q Does your formula account for the discounts that are given to the class members?
> A Yes.
> Q Explain to the Judge how your formula and I'm being careful, I'm not talking about the multiple regression model, I'm talking about the formula, because it tests their formulaic way of estimating damages class wide.
> A Right.
> Q So, let me step back a second. From your expert opinion, is your formula an appropriate way to reliably estimate damages class wide?
> A Yes.
> Q All right, now, explain to the Judge how your formula takes into account the discounts that are given some of which, Mr. Korpus discussed with you on your cross-24 examination?
> A The short answer is it does it in the revenue.
>
> . . .
>
> So, when I said in answers to questions on cross, what I was trying to say is discounts are taken into account at the multiplication stage. At the stage at which we do this. We don't, we don't pretend that everybody is

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weighted average prices in her model disrupts this equilibrium because she then, like Dr. McClave, uses the resulting overcharge to calculate damages based on Comcast's revenue. The revenue side of the formula, however, already takes into account any discount from list price because that is revenue that Comcast never received. Because Dr. Chipty's weighted average prices double count the discount, we find it does not impeach Dr. McClave's model.

Chipty has also modified McClave's model by (1) dropping counties outside the Philadelphia DMA where an incumbent cable operator offers CSN Philadelphia, because, she contends, they are the only Comcast counties where the Class's experts would say that DBS competition has been unfairly impaired; and (2) adding two additional explanatory variables into the model, Comcast's share of households measured at the DMA level rather than the county level, and the total number of subscribers served by Comcast in the DMA. (Chipty Reply Cl. Decl. Ex. 7 ("the Exhibit 7 model").) Chipty explains that these two variables reflect different aspects of cluster size. (*Id.* ¶ 100, Ex. 7.) Chipty then uses the Exhibit 7 model's estimation to attempt to directly calculate the extent of the monopoly overcharge associated with clustering by adding the marginal effect of the total number of Comcast subscribers in the DMA on price and the marginal effect of Comcast's share of DMA subscribers on price for each county-year, using 1999 as a base year. (*Id.* ¶ 102.)

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paying list. We take explicitly into account what people are paying, including the Triple Play.

(N.T. 10/13/09 at 98:9-25; 101:6-11.)

Using this method, the damage results she obtained are either statistically indistinguishable from zero, or they are negative. (*Id.* ¶ 103.)

We find that the Exhibit 7 model also suffers significant flaws. First, this model is not a multiple regression model based on comparing benchmarks to estimate "but-for" prices. It purports to be a direct calculation of the competitive overcharge. Dr. McClave, the only statistician expert either side presented,[57] remarks that this method of measuring a competitive overcharge is a "novel and non-standard formula for calculating damages," which he has never seen applied in any similar form to a calculation of damages.[58] (McClave Cl. Reply Decl. at 13.) He calculates that if the Exhibit 7 model is used correctly to estimate "but-for" prices and damages in

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[57] Dr. Chipty's expertise is in economics and econometrics, which she defined as the application of statistics to economic issues. (N.T. 10/26/09 at 73:12-15.)

[58] McClave criticizes Chipty's use of the two explanatory variables because they are confounded with other factors in the model:

> Her claim that the two explanatory variables used in her formula – Comcast's number of subscribers and DMA market share – are not confounded with the other factors in the model is demonstrably false. One of the factors in her model is Year, and we know that Comcast's number of subscribers and market share has grown over time. Thus, the Year effect in her model is hopelessly confounded with the two subscriber and market share effects, meaning that the estimates she assumes are un-confounded measures of clustering are not. In fact, the clustering effects are also contained in and measured by the Year effect.

(McClave Cl. Reply Decl. at 14.)

the standard manner, her damage estimate would have been $1.186 billion, which is greater than his own damage calculation. (*Id.* at 14; Ex. P82 (red graph).) Accordingly, we find it does not impeach Dr. McClave's model.

4. Dr. Chipty's B1 model

Basic cable prices are referred to as B1 prices, while expanded basic cable, which includes the B1 service, are referred to as B1/B2/B3 prices. Dr. Chipty next tries to impeach Dr. McClave's model by examining what result would obtain if the McClave model were used to examine the regulated prices of basic cable. She explains:

> Since B1 prices are largely determined by regulation (and excluded from Plaintiffs' product market definition), in reality the putative anticompetitive conduct alleged in the Complaint can have no effect on B1 price. As such, an appropriate damages model would not yield any "overcharge" damages associated with the B1 component of prices. Indeed, any differences between B1 prices in Philadelphia and the rest of Dr. McClave's benchmark sample must be due entirely to differences in costs, demographics, and service offerings that are not captured in Dr. McClave's model (unless of course, Plaintiffs are suggesting that the local franchise authorities in the Philadelphia Cluster are themselves harming consumers by unfairly setting higher B1 prices). Thus, applying Dr. McClave' regression model to B1 prices provides a powerful "falsification" test.
>
> In fact, limiting Dr. McClave's benchmark sample to areas in which B1 rates are

> regulated (i.e., eliminating the areas that have received an effective competition designation from the FCC) and using his methodology for B1 prices only, Dr. McClave's model "finds" significant overcharges! His analysis run using all prices (B1, B2, and where available B3) purports to show overcharges that range between 11.1 and 17.2 percent over the years 2003 to 2008, with an overall (2000 to 2008) average surcharge of 13.1 percent. By comparison, his analysis, when run using B1 prices only shows overcharges that range between -1.9 and 17.0 percent over the years 2003 to 2008, with an overall (2000 to 2008) average surcharge of 9.8 percent.

(Chipty Supp. Decl. ¶¶ 61-62.) Applying the 9.8% overcharge, she concludes that the McClave model, applied to only B1 prices, would result in $675 million in damages to the Class, accounting for 77% of the total damages found by Dr. McClave. (*Id.* ¶ 63.) Because, she claims, a properly specified model should find no damages associated with the regulated B1 prices, she concludes that Dr. McClave's methodology fails to capture significant differences between his benchmark sample and the Philadelphia Cluster, and that his damage estimates are divorced from the allegations in the Complaint. (*Id.*)

We find that Dr. Chipty's B1 model does not impeach the McClave model. First, McClave specified a regression model to test expanded basic cable prices, not basic cable prices. Using his model to test B1 prices is irrelevant.[59] Second, Dr. Chipty admitted

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[59] Dr. McClave testified that "I don't expect this model to estimate prices other than the expanded basic prices. If you

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on cross-examination that she applied her model's 9.8% overcharge to Comcast's total relevant revenue, not Comcast's relevant B1 revenue, to come up with her $675 million damage calculation.[60] Moreover, the record demonstrates that, while B1 prices may vary from franchise area to franchise area because they are regulated by each individual local franchise agency, the total price that Comcast charges for B1/B2/B3 services across the Philadelphia DMA remains largely unchanged from franchise area to franchise area. (Ex. P87.) Comcast alters the price of B2/B3 component of its services from franchise area to franchise area to equalize the total price of its

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changed the price to the regulated price, then I would expect other variables to be important and so, it's not my model. (N.T. 10/14/09 at 90:20-23.)

60 Dr. Chipty testified:

> Q What you're showing, I think what you said right at the end of your discussions, "I was shocked to find," you used the word "shock" "that Dr. McClave's model," which of course he says is not his model, "that Dr. McClave's model shows $675 million worth of damages based on B1 prices only.
> A Based on an overcharge calculated in B1 prices, yes.
> Q You didn't multiply that overcharge on B1 revenues only, did you?
> A No, of course not.

(N.T. 10/26/09 at 104:1-9.)

combined B1/B2/B3 expanded basic cable service.[61] It is within the B2/B3 section of the total price that the anticompetitive overcharge occurs. Accordingly, any application of the McClave model to B1 prices explains nothing.

5. McClave's use of DBS penetration as a screen without separately testing each of Dr. Williams' hypotheses

Finally, we address an issue we raised after the close of evidence for the parties to address in their final arguments: how do we interpret Dr. McClave's damages model if, as we anticipated would occur, we credited at least one but not all of Dr. Williams' four bases for antitrust impact? Having reviewed Dr. McClave's methodology more closely, we are convinced that our decision not to credit William's DBS foreclosure theory of antitrust impact does not impeach Dr. McClave's damages model.

As we explained above, Dr. McClave used the average DBS penetration rate for Comcast markets as

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61 Dr. McClave testified that Ex. P87 shows this equalization process:

> If you look now at the lower blue – light blue bars, that's the regulated and it turns out both of these are regulated franchises. So, $11.75 is the regulated price or at least, what Comcast charges. It may be actually less than the regulated price for Haverford and $17.85 is the regulated or basic price in Upper Darby. And the point I'm making with this is the B-1 price doesn't matter, because what Comcast does is add whatever it needs to add to get to its list price. So, it would have had to add a different amount to the $17.85, whatever the difference between that and $52.25 is, then it did when it had to add $11.75 to the $52.25.

(N.T. 10/14/09 at 94:10-21.)

a screen to select which counties could serve as benchmarks so that he could compare other Comcast prices with the prices charged in the Philadelphia DMA. Once a county passed his two screens, signifying that it qualified as a proper source for pricing data, McClave then applied his regression model's variables to equalize the county's benchmark data in order to isolate the effect of the anticompetitive conduct on price. His selection of the DBS screen to serve this purpose is entirely unrelated to Dr. Williams' DBS foreclosure theory. It was merely his method of choosing counties to serve as comparators. Any anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties. Thus, whether or not we accepted all of Dr. Williams' theories of antitrust impact is inapposite to Dr. McClave's methods of choosing benchmarks. Because we have determined that the national average DBS penetration rate for Comcast markets is a valid screen, we conclude that the McClave model is a common methodology available to measure and quantify damages on a class-wide basis.

IV. CONCLUSION

The Class has demonstrated that the appropriate geographic market can be the Philadelphia DMA, as well as at least one theory of antitrust impact, and a common damages methodology. Having found that the Class has demonstrated that it can establish its antitrust claims through common evidence of antitrust impact applicable to all class members, we accordingly grant the Amended Motion to certify the Philadelphia Class. We conclude that the following class should be certified:

> all cable television customers who subscribe or subscribed at any time since December 1, 1999 to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

For the purposes of this class definition, the term "Comcast's Philadelphia cluster" is defined to mean:

> those areas covered by Comcast's cable franchises or any of its subsidiaries or affiliates, located in Philadelphia, Pennsylvania and geographically contiguous areas, or areas in close geographic proximity to Philadelphia, Pennsylvania, which is comprised of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey.

An appropriate Order will be entered.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLINE BEHREND, et al.	:	CIVIL ACTION
v.	:	
COMCAST CORPORATION, et al.	:	NO. 03-6604

AMENDED ORDER

AND NOW, this 13th day of January, 2010, upon consideration of Plaintiffs' Amended Motion for Certification of the Philadelphia Class (Docket Entry 330), all responses thereto, the testimony heard by the Court, and the arguments of counsel, including the letters of counsel dated January 12, 2010, **IT IS HEREBY ORDERED** that the Court's Order of January 7, 2010 (Docket Entry 430) is **VACATED**. In its stead, **IT IS HEREBY ORDERED** as follows:

1. On May 3, 2007, the Court granted Plaintiffs' motion for certification of the Philadelphia class.

2. On March 30, 2009, following the decision of the United States Court of Appeals for the Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), the Court granted Comcast's motion to reconsider the certification decision. Plaintiffs filed an Amended Motion for Class Certification.

3. The only class certification element that remained in dispute was the requirement of Fed.

R. Civ. P. 23(b)(2) that common issues of law and fact predominate. In our May 3, 2007 certification decision, the Court determined that the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy had been satisfied by the Class and that the Class satisfied the Rule 23(b)(3) requirement of superiority. The Court reaffirms and hereby incorporates those findings.

4. Pursuant to Rule 23(b)(3), the Court finds that the Class has demonstrated by a preponderance of the evidence that questions of law and fact common to the members of the class predominate over any question affecting individual members of the class.

5. The Court finds that the Class has demonstrated by a preponderance of the evidence that the appropriate relevant geographic market can be the Philadelphia Designated Marketing Area ("DMA") and that this geographic market definition is susceptible to proof at trial through available evidence common to the class.

6. The Court finds that the Class has demonstrated by a preponderance of the evidence that antitrust impact or injury is subject to proof at trial through available evidence common to the class on one of Plaintiffs' theories of antitrust impact; namely that antitrust impact, if any, of Comcast's clustering through the challenged swaps and acquisitions on overbuilder competition is capable of proof at trial through evidence that is common to the class.

7. The Court finds that the Class has demonstrated by a preponderance of the evidence that the model and analyses contained in the expert reports and testimony of Plaintiffs' expert,

Dr. James McClave, are common evidence available to measure and quantify damages on a class wide basis.

8. The Court finds that the Class has demonstrated by a preponderance of the evidence that it can seek to establish the antitrust impact element of its claims that Comcast has violated §§ 1 and 2 of the Sherman Act through common evidence of antitrust impact applicable to all class members.

9. Plaintiffs' Amended Motion for Certification of the Philadelphia Class is again **GRANTED**.

10. The Court **CERTIFIES** the following plaintiff class pursuant to Fed. R. Civ. P. 23(a) and (b)(3):

> All cable television customers who subscribe or subscribed at any time from December 1, 1999 to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.
>
> For purposes of this class definition, the term "Comcast's Philadelphia cluster" is defined to mean:
>
> those areas covered by Comcast's cable franchises or any of its subsidiaries or affiliates, located in Philadelphia, Pennsylvania and geographically contiguous areas, or areas in close geographic proximity to Philadelphia, Pennsylvania, which is composed of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester,

Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey.

11. The Class is certified for resolution of the following claims:

    a. Whether Defendants conspired with competitors, and whether Defendants entered into and implemented agreements with competitors, to allocate markets, territories, and customers for cable television services; and whether such conduct is a per se violation, or whether it constitutes a restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

    b. Whether Defendants unlawfully attempted to monopolize, or unlawfully possess and willfully acquired or maintained monopoly power in, the Philadelphia area cable market with respect to cable television services in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;

    c. Whether Defendants' acts alleged to violate Sections 1 and 2 of the Sherman Act caused prices for cable television services in the relevant markets to be artificially high and not competitive; and

    d. Whether Plaintiffs and members of the class were injured by Defendants' alleged conduct in violation of Sections 1 and 2 of the Sherman Act.

Proof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which

was to deter the entry of overbuilders in the Philadelphia DMA.

12. The Court's Memorandum dated January 7, 2010 is incorporated herein by reference.

13. The Class is further certified for resolution of the following issues and affirmative defenses:

    a. The measure of damages by which Defendants' alleged conduct injured Plaintiffs and members of the Philadelphia Class;

    b. Whether Plaintiffs and members of the Philadelphia Class are entitled to injunctive relief as a result of Defendants' alleged conduct in violation of the Sherman Act; and

    c. Whether Affirmative Defenses One through Fourteen asserted in Defendants' Answer and Affirmative Defenses are valid.

14. Plaintiffs Caroline Behrend and Stanford Glaberson are **APPOINTED** as representatives of the Philadelphia Class.

15. Pursuant to Fed. R. Civ. P. 23(g), the law firms of Heins Mills & Olson, P.L.C. and Susman Godfrey, L.L.P. are **APPOINTED** Co-Lead Counsel for the Philadelphia Class.

16. Defendants' Motion for Partial Findings Pursuant to Fed. R. Civ. P. 52(c) (Docket Entry 412) is **DENIED**.

16. Plaintiffs' Motion to Seal Document (Docket Entry 418) is **GRANTED**.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-2865

CAROLINE BEHREND; STANFORD GLABERSON;
JOAN EVANCHUK-KIND; ERIC BRISLAWN

v.

COMCAST CORPORATION;
COMCAST HOLDINGS CORPORATION;
COMCAST CABLE COMMUNICATIONS, INC.;
COMCAST CABLECOMMUNICATIONS
HOLDINGS, INC.; COMCAST
CABLE HOLDINGS, LLC,

Appellants

BEFORE: McKee, Chief Judge, SLOVITER,
SCIRICA, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, VANASKIE, ALDISERT,*
Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED. Judge Jordan would grant rehearing *en banc*.

BY THE COURT:

/s/ Ruggero J. Aldisert
United States Circuit Judge

DATED: September 20, 2011

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* As to panel rehearing only

APPENDIX E

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are

authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

OPPOSITION BRIEF

RECORD AND BRIEFS

No. 11-864

Supreme Court, U.S.
FILED
APR - 9 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COMCAST CORPORATION, COMCAST HOLDINGS CORPORATION, COMCAST CABLE COMMUNICATIONS, INC., COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., and COMCAST CABLE HOLDINGS, LLC,

Petitioners,

v.

CAROLINE BEHREND, STANFORD GLABERSON, JOAN EVANCHUK-KIND, and ERIC BRISLAWN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals properly affirmed an order granting class certification, which the district court rendered after conducting a four-day evidentiary hearing, considering expert and fact witness testimony, reviewing documentary evidence, entertaining extensive argument and briefing, and making exhaustive fact findings on issues necessary for all live Rule 23 determinations, even when such issues overlapped with the merits, but declining to reach merits issues unnecessary to make Rule 23 determinations at the class certification stage.

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STATEMENT OF THE CASE

A. The suit. Comcast and other cable providers engaged in market "swaps" in which competitors operating within major metropolitan areas exchanged territories and subscribers like chattel. These "swaps" aimed at – and achieved – market dominance by a single cable provider for each major U.S. city's cable market through pure market allocations. After achieving a dominant position in the Philadelphia market, Comcast abused its dominance to stifle competition from those cable providers that did not participate in the "swaps." The record evidence stands undisputed: in the Philadelphia area, a geographic market where Comcast achieved dominance, Comcast charges significantly-higher prices for expanded basic cable service.

Plaintiffs brought suit, alleging violations of sections 1 and 2 of the Sherman Act for Comcast's antitrust violations. The district court certified a class of Comcast subscribers in the Philadelphia area to press these claims. Plaintiffs' experts, based on extensive analyses and well-accepted methods, have shown (1) that Comcast's market dominance deterred overbuilders and caused higher prices throughout the Philadelphia area and (2) that the amounts of the supracompetitive prices could be estimated based on a statistical analysis common to the class. With Comcast's explicit acquiescence, the only Rule 23 issues at recertification and on appeal involve Rule 23(b)(3)'s predominance over individualized issues for

both (1) antitrust impact and (2) class-wide proof of damages.

In its petition, Comcast mischaracterizes the rigorous analysis conducted by both the district court and the appellate court below. Despite Comcast's unsupported assertions, the district court resolved all disputes – including merits issues – necessary to conclude that the class met Rule 23's prerequisites for certification. And the Third Circuit reviewed those determinations using the stringent standard this Court first set forth in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), and reiterated in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Most importantly, at no point did the Third Circuit attempt to "resuscitate" an incorrect interpretation of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Third Circuit precedent, *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), fully embodies the Court's demands for Rule 23. Indeed, the appellate court below noted *Hydrogen Peroxide*'s conformance with *Dukes*: "[t]he Supreme Court confirmed our interpretation of the Rule 23 inquiry in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)." Petitioners' Appendix (P.A.), at 14a n.6 (citing *Dukes*, 131 S. Ct. at 2551, 2552 n.6 for the proposition that "[f]requently [the Rule 23] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim," but *Eisen* still prohibits "a merits inquiry for any other pretrial purpose").

The class certification order – the product of years of analysis by two teams of experts, multiple volumes of expert reports and depositions, extensive briefing, a multi-day mini-trial, the district court's detailed, fact-driven analysis, and the circuit court's comprehensive review – exceeds the most ardent applications of both *Falcon* and *Dukes*. *See Falcon*, 457 U.S. at 160 (recognizing that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification questions"); *Dukes*, 131 S. Ct. at 2251 (noting that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied'" (quoting *Falcon*, at 160)).

Before certifying the class of Philadelphia cable subscribers, Judge Padova, the district judge, carefully evaluated all disputed elements of Rule 23 and found the elements satisfied. The district court did exactly what this Court has directed district courts to do in evaluating class certification motions. The road to class certification, while not direct, resulted in an order and analysis that withstands any legitimate challenge.

B. The district court. In May 2007, Judge Padova certified the Philadelphia class. Respondents' Appendix (R.A.), at 1-2. But the initial certification order predated *Hydrogen Peroxide*. After the Third Circuit issued *Hydrogen Peroxide*, the district court granted in part Comcast's motion to reconsider class certification. R.A., at 3-6.

In the March 2009 order decertifying the Philadelphia class, the district court noted the deficiency in its initial certification order:

> In our decision certifying the Philadelphia Class – issued before the *Peroxide* decision – we did not make factual findings under the preponderance of the evidence standard or resolve the experts' disputed opinions. . . . Because we did not require the Class to show the factual basis of its expert's opinions by a preponderance of the evidence and did not make specific credibility determinations, our finding that the Class satisfied the requirement of Rule 23(b) must be vacated.

R.A., at 4 n.1.

At that time the district court confirmed that Comcast had limited its certification challenge to "the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages." R.A., at 5 n.2. Accordingly, the Rule 23 requirements for this class involved *only* whether the issues of antitrust impact and damages methodology predominate over individualized issues. Comcast conceded all other aspects of Rule 23.

The district court then put plaintiffs to their burden. In the ensuing six months, the parties turned their respective experts to the task of evaluating a host of issues related to predominance of antitrust impact and damages methodology.

The effort yielded 32 expert reports, followed by depositions of the same experts. The parties marshaled, indexed, and submitted class-related documents to the district court. And, as directed by the district court, the parties briefed the live class certification issues and submitted both pre-hearing memoranda and annotated proposed findings and conclusions.

The district court considered all of these materials before presiding over a four-day evidentiary hearing on the class certification questions on October 13-15 and 26, 2009. During the evidentiary hearing, plaintiffs called two experts, Dr. James T. McClave on damages and Dr. Michael A. Williams on liability. Both experts faced significant questioning by Comcast – and by Judge Padova. Both of plaintiffs' experts withstood the trial of cross examination.

Comcast offered experts too. The district court accepted the experts' numerous reports as direct testimony, permitted additional direct testimony, and exposed the experts to questioning. Unlike plaintiffs' experts, Comcast's experts failed to defend their positions fully in the face of cross examination.

The class certification evidentiary hearing involved more than experts. After plaintiffs concluded their presentation, Comcast moved for a ruling (in the nature of a Rule 52(c) motion) to the effect that plaintiffs had not met their burden. The parties briefed the issues, and the district court, after considering the briefing and hearing argument, denied

Comcast's motion. The district court compiled an extensive fact record. Comcast offered live testimony from a Comcast executive at the hearing. In addition, both parties submitted a wealth of documentary evidence, post-hearing briefs, and a[illegible]tated proposed findings and conclusions. Later, Judge Padova posed further questions to the parties and held additional argument on the questions.

After evaluating all of the briefing and argument, the expert reports, the documentary evidence, and the live testimony of the expert and fact witnesses, the district court applied its judgment, made credibility determinations, evaluated the evidence, and found that plaintiffs satisfied the predominance requirement of Rule 23(b)(3) – the only disputed issue – by a preponderance of the evidence. The district court's memorandum on recertification of the class explains in detail the disputed points between each party's experts and why the district court accepted the positions of plaintiffs' experts over those of Comcast's experts in connection with the key issues of predominance for antitrust impact and damages methodology.

Rather than run from "merits arguments," the district court embraced the charge to make all findings necessary to rule on class certification: "Class certification is only appropriate 'if the trial court is satisfied, after a rigorous analysis,' that each requirement of Rule 23 has been met." P.A., at 92a (quoting *Falcon*, 457 U.S. at 161). The district court's detailed memorandum reflects the "rigorous analysis" that Comcast claims never happened.

C. The circuit court. Comcast appealed from the order certifying the Philadelphia class. The Third Circuit upheld the order based on its own exacting review of the district court's comprehensive fact findings on Rule 23 issues. Applying *Hydrogen Peroxide*, the majority explained that to certify a class the "district court must conduct a 'rigorous analysis' of the evidence and arguments in making the class certification decision." P.A., at 13a. "The analysis requires 'a thorough examination of the factual and legal allegations' and 'may include a preliminary inquiry into the merits.'" P.A., at 13a (quoting *Hydrogen Peroxide*, 552 F.3d at 317). The majority explained, however, at the class certifications stage, it could not address "any merits inquiry *unnecessary* to making a Rule 23 determination." P.A., at 14a (citing *Hydrogen Peroxide*, 552 F.3d at 316-17) (emphasis added).

The Third Circuit noted that plaintiffs "bear the burden of establishing each element of Rule 23 by a preponderance of the evidence." P.A., at 14a. For Rule 23(b)(3), the majority explained, plaintiffs needed to prove that the proposed class qualifies as "sufficiently cohesive to warrant adjudication by representation." P.A., at 15a (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). To make the Rule 23(b)(3) predominance showing, the Third Circuit said, plaintiffs had to "demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than

individual to its members." P.A., at 15a (quoting *Hydrogen Peroxide*, 552 F.3d at 311-12).

Even though this Court has said that certain antitrust claims readily meet the predominance test, *see Amchem*, 521 U.S. at 625, the appellate court stressed that it would "not relax its certification analysis." P.A., at 15a. The appeals court then painstakingly parsed through the voluminous record and the district court's many factual determinations to satisfy itself of Judge Padova's analysis.

First, the court of appeals agreed that "the Philadelphia DMA is a relevant geographic market susceptible to proof at trial through available evidence common to the class." P.A., at 17a-18a (internal quotation marks omitted). The majority agreed with the district court's factual findings "that consumers face similar competitive choices in the Philadelphia DMA." P.A., at 19a-20a (internal quotation marks omitted). Although Comcast alleged that the district court improperly defined the relevant geographic market, the majority pointed out that Comcast's argument exceeded the Rule 23 inquiry. *See* P.A., at 18a.

In determining whether to certify a class, the majority recognized that the district court may resolve only those merits arguments *necessary* to satisfy Rule 23. *See* P.A., at 14a. Because Rule 23(b)(3) requires that common questions predominate over individual questions, the panel properly focused on whether "the class could establish through common proof that the relevant geographic market could be

the Philadelphia DMA" and not on the actual definition of the geographic market. P.A., at 19a, 22a-23a. The Third Circuit below correctly refused to go beyond the live Rule 23(b)(3) predominance inquiry.

Second, the court below sided with the district court by recognizing that "the Class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class." P.A., at 25a (internal quotation marks omitted). The district court weighed the testimony of several experts and determined that a preponderance of the evidence showed that "Comcast's alleged clustering conduct indeed could have reduced competition, raised barriers to market entry by an overbuilder, and resulted in higher cable prices to all of its subscribers" in the Philadelphia area. P.A., at 29a. The Third Circuit agreed that "there was ample evidence that clustering conduct can deter entry of overbuilders and result in higher cable prices." P.A., at 31a.

Similarly, Comcast asked the Third Circuit to reverse the district court's findings regarding antitrust impact because, it claimed, plaintiffs failed to establish antitrust impact. P.A., at 30a. Again, the Third Circuit pointed out that Comcast's merits arguments exceeded Rule 23(b)(3)'s scope and reminded Comcast of the well-excepted limitation for Rule 23 inquiries: "a district court may inquire into the merits

only insofar as it is 'necessary' to determine whether a class certification requirement is met." P.A., at 33a.

The Third Circuit held, as have other circuits, that the proper inquiry under Rule 23 remains whether "Plaintiffs [have] demonstrated by a preponderance of the evidence that they *could* prove antitrust impact through common evidence at trial," and not whether plaintiffs have actually proven antitrust impact. P.A., at 28a. To ask a district court to do the latter would turn class certification into a trial, the majority warned, and would run "dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury's factual findings" with the district court's views. *See* P.A., at 33a-34a.

Third, the majority agreed with the district court that through the extensive expert testimony of Dr. McClave, plaintiffs had "provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis." P.A., at 35a. The majority even noted that "Comcast does not contest that the Court performed the 'rigorous analysis' required by *Hydrogen Peroxide*." P.A., at 35a. Instead, Comcast, again, attacked the district court's findings for failing to decide merits issues extraneous to the Rule 23(b)(3) inquiry. The majority characterized Comcast's flawed approach: "the heart of Comcast's arguments are attacks on the merits of the methodology that have no place in the class certification inquiry." P.A., at 48a. Even if the majority had overruled the district court's findings regarding Dr. McClave's methodology, the appellate court

noted that "only the final amount of estimated damages would change," *not* the fact that plaintiffs could prove damages through common proof on a class-wide basis. P.A., at 48a-49a.

After a rigorous analysis both in the district court and in the Third Circuit, and after reaching and deciding those merits issues necessary for the Rule 23(b)(3) inquiry, Judge Padova concluded, and the Third Circuit affirmed, that plaintiffs had demonstrated by a preponderance of the evidence that the questions of law and fact common to the class predominated over individual questions. Both the approach and result conform to *Falcon*, *Dukes*, and the other circuit courts.

REASONS FOR DENYING THE PETITION

The Court should deny Comcast's petition because the Third Circuit's opinion properly described and applied the relevant class certification standard and because that opinion does not create a circuit split. The Third Circuit does *not* conflict with other circuits. It did *not* decline to decide all merits issues necessary to apply Rule 23. And the Third Circuit did *not* revive any misinterpretation of *Eisen*. The Court should reject Comcast's arguments and deny the petition.

I. The courts below certified the class using the same standard as *Falcon* and *Dukes*.

Comcast argues that this Court should grant its petition under the false claim that the Third Circuit "affirmed the certification order after concluding that it was foreclosed from considering" whether "individual issues of antitrust impact and damages would overwhelm any purportedly common issues." Pet., at 11. But Comcast's articulation of the issues on appeal bears no relation to the class certification record, the facts, or the analysis of both the district court and the appellate court.[1]

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[1] Before the four-day evidentiary hearing on class certification, Judge Padova announced to the parties the standard he planned to apply to the Rule 23 inquiry by providing a printout of the standard:

> Plaintiff's burden at the class certification stage is not to prove the element of antitrust impact. Plaintiff's task at the class certification stage is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class, rather than individual to its members. This calls for the District Court to employ a rigorous assessment of the available evidence and the method by which plaintiffs propose to use the evidence to prove impact at trial. Factual determinations must be made by a preponderance of the evidence. A District Court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23. District Courts must resolve factual disputes by a preponderance of the evidence and make a finding that each Rule 23 requirement is met.

R.A., at 7. Judge Padova asked the parties for comments and invited counsel to address whether this was the correct standard.

(Continued on following page)

Affirming the district court, the Third Circuit unequivocally directed district courts to conduct "preliminary merits inquiries when necessary for Rule 23." P.A., at 33a. As described above, Judge Padova performed the necessary inquiries. The majority correctly declined to address merits inquiries unnecessary to the class certification analysis. Having analyzed predominance, the Third Circuit properly applied the same standard used by this Court in *Falcon* and *Dukes*, by the Third Circuit in *Hydrogen Peroxide*, and by appellate courts in many other circuits.

A. *Falcon* and *Dukes*. In *Falcon*, this Court determined that a district court improperly certified a class. 457 U.S. at 159-60. The *Falcon* defendants had challenged the plaintiff's adequacy as a class representative, but the district court disregarded the

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The parties agreed on the standard. During argument, Comcast's counsel indicated a consistent view:

> Your Honor, I agree with [plaintiffs' counsel] that plaintiffs don't have to prove antitrust impact at this hearing but they do have to prove they can prove it. They have to prove that they can prove this by proof common to the class, they have to prove that common issues predominate on the question of antitrust impact and that they can establish damages by a common and credible and reliable damages methodology.

Hearing Tr. (Oct. 13, 2009), at 20:40-10. Comcast now contends that Judge Padova applied an incorrect standard. Comcast cannot take such inconsistent positions in successive stages of the litigation. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

defendants' arguments. *Id.* at 152. Instead, the district court allowed the plaintiff to maintain an "across the board" attack against all of his employer's unequal employment practices made pursuant to a policy of racial discrimination. *Id.* Ultimately, the case proceeded to trial, where the district court made separate findings on liability for the plaintiff and the class because the two suffered different discriminatory practices. *Id.* This Court pointed out that the district court's error arose from its "failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." *Id.* at 160. Because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," the Court reasoned, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.*

The Court recently revisited *Falcon* in *Dukes*. In *Dukes*, the Court reiterated that "'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Id.* at 2551 (quoting *Falcon*, 457 U.S. at 160-61) (citations omitted).

The Third Circuit uses this same standard, both in this case and others. In *Hydrogen Peroxide*, the Third Circuit held that district courts "*must* resolve

all factual or legal disputes relevant to class certification, even if they overlap with the merits." *Hydrogen Peroxide*, 552 F.3d at 307 (emphasis added). Relying on *Falcon*, the Third Circuit explained that "[c]lass certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." *Id.* at 310 (quoting *Falcon*, 457 U.S. at 161).

As in *Falcon*, *Dukes*, and *Hydrogen Peroxide*, the court below required an evaluation of disputed Rule 23 issues: "The district court must conduct a 'rigorous analysis' of the evidence and arguments in making the class certification decision." P.A., at 13a. "The analysis requires 'a thorough examination of the factual and legal allegations' and 'may include a preliminary inquiry into the merits.'" P.A., at 13a (quoting *Hydrogen Peroxide*, 552 F.3d at 317). The majority's opinion does not break with any precedent. To the contrary, its detailed opinion shows that the Third Circuit faithfully applied *Falcon*'s exacting standard.

B. ***Eisen.*** Despite the Third Circuit's adherence to *Falcon*, Comcast twists the majority's citation to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), into a baseless argument. Comcast states inaccurately that "the Third Circuit professed itself, under *Eisen*, unable even to consider, much less to resolve, Comcast's challenges to the class certification order because those 'merits arguments' were 'not properly before' the court." Pet., at 15. In reality, the Third Circuit announced the exact opposite: "*Eisen* is best

understood to preclude *only* a merits inquiry that is not necessary to determine a Rule 23 requirement." P.A., at 14a (quoting *Hydrogen Peroxide*, 552 F.3d at 316-17). And the Third Circuit's position on the level of inquiry leaves no doubt that it comports with *Falcon*, *Dukes*, and other circuit courts' opinions: "a district court . . . may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits. Genuine disputes with respect to the Rule 23 requirements must be resolved, after considering all relevant evidence submitted by the parties." *Hydrogen Peroxide*, 552 F.3d at 324 (citing, *inter alia*, *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)).

Comcast demands that plaintiffs prove *everything* at the class certification stage. By asserting that the majority did not consider "merits arguments," Comcast makes another pass at bringing non-Rule 23 issues into class certification. Comcast contends plaintiffs must prove the relevant geographic market, that clustering deters overbuilders, that plaintiffs' damages model prevails, and a host of other non-Rule 23 issues. *See* Pet. at 19-22. But these issues remain unnecessary for the Rule 23(b)(3) predominance questions presented below. And *Falcon*, *Dukes*, and *Hydrogen Peroxide* all forbid a district court from deciding these non-Rule 23 issues in the context of class certification.

C. Capable of proof. *Dukes* highlights Comcast's error. In the context of Rule 23(a), the Court stated that plaintiffs prove commonality by showing

that their claims "depend on a common contention," which "must be of such a nature that it is *capable* of classwide resolution." *Dukes*, 131 S. Ct. at 2551 (emphasis added).

The panel majority applied this same standard in the Rule 23(b)(3) context, by requiring plaintiffs to prove the predominance of common questions by demonstrating that the elements of their claims are "*capable* of proof at trial through evidence that is common to the class rather than individual to its members." P.A., at 56a (emphasis added). Even the dissent below agreed that the "Majority opinion skillfully [laid] out the legal requirements for predominance," which asks only "whether antitrust impact is *capable* of proof . . . through the use of common evidence." P.A., at 56a (Jordan, J., dissenting) (emphasis added). The Third Circuit's standard, described in *Hydrogen Peroxide* and applied below, mirrors the Rule 23 inquiries in *Falcon* and *Dukes*.

II. The Third Circuit's "rigorous analysis" puts it squarely in line with the Eighth and Ninth Circuits as well as other circuits.

The circuit courts, including the Third Circuit, speak with one voice on the nature of inquiry to certify a class under Rule 23. They agree that a district court may not certify a class without resolving merits arguments necessary to determine Rule 23's prerequisites. *Hydrogen Peroxide* conforms to that standard. And the district court and the Third Circuit applied that standard in this case. Petitioners'

argument rests on the false premise that the Third Circuit demands anything different.

To pique the Court's attention, Comcast manufactures a non-existent circuit split between the Third Circuit and the Eighth and Ninth Circuits. Not only do the cases, which Comcast says "cannot be reconciled" with *Hydrogen Peroxide*, articulate the same standard as *Hydrogen Peroxide*, but other circuit courts use the same standard. No split exists.

A. *Ellis* and *Hydrogen Peroxide*. As its chief example of the non-existent split between the Third Circuit and the Eighth and Ninth Circuits, Comcast cites *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 977-78 (9th Cir. 2011). Pet., at 22-24. *Ellis* fails to advance Comcast's argument because the standard matches that applied by the Third Circuit and because the district court's analysis in *Ellis* contained a reversible flaw not present here.

In *Ellis*, both parties submitted expert testimony on the issue of commonality. *Id.* at 982. The district court entertained motions to strike plaintiffs' experts and applied *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), to render the expert testimony admissible. But the district court ended its inquiry at that point. *See Ellis*, 657 F.3d at 982. The problem, in the Ninth Circuit's view, flowed from the district court's failure to conduct a "rigorous analysis" of the testimony beyond admissibility:

> [T]he district court seems to have confused the *Daubert* standard it correctly applied to

> Costco's motions to strike with the "rigorous analysis" standard to be applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible.

Ellis, 657 F.3d at 983. Similarly, the Ninth Circuit condemned the district court's acceptance of the plaintiffs' class certification position by virtue of the district court's determination that Costco had "not discredited" plaintiffs' expert. *Id.* at 984. The *Ellis* court remanded because of the district court's "fail[ure] to resolve the[se] critical factual disputes." *Id.* (noting that, "to the extent the district court limited its analysis of whether there was commonality to a determination of whether Plaintiffs' evidence on that point was admissible, it did so in error").

By contrast, Judge Padova took the step missing in *Ellis* and "judg[ed] the persuasiveness of the evidence presented," *Ellis*, 657 F.3d at 982, at the class certification stage to make a ruling on the live Rule 23 issues. Judge Padova's memorandum sets out a multitude of fact-based evaluations and findings, each one necessary, in the district court's view, to support the Rule 23(b)(3) ruling on predominance of antitrust impact and damages methodology. *Ellis* demands no more.

Indeed, the Ninth Circuit in *Ellis* expressly stated that the district court "was not required to resolve factual disputes" that proved unnecessary for a Rule 23 ruling. *See id.* at 983 (identifying specific merits issues not necessary for determination at the class certification stage). Far from a conflict, the approach in *Ellis* – resolving issues necessary for Rule 23 and reserving unnecessary issues – stands shoulder to shoulder with Judge Padova's approach, the Third Circuit's guidance on Rule 23, and this Court's precedents in *Falcon* and *Dukes*. No conflict exists.

B. ***Bennett* and *Hydrogen Peroxide*.** Even less supportive of its position, Comcast attempts to generate controversy between the Third Circuit and the Eighth Circuit's opinion in *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), cert. denied, Nos. 11-917, 11938, 2012 WL 296175, 2012 WL 297079, (U.S. Mar. 26, Apr. 2, 2012), by claiming that *Hydrogen Peroxide* "cannot be reconciled with the Eighth Circuit's opinion." Pet., at 24.[2] But *Bennett* actually tracks *Hydrogen Peroxide*'s analysis.

In both *Bennett* and this case, the parties created an extensive class certification record. *Compare* P.A., at 8a ("During the four-day hearing, the Court heard live testimony from fact and expert witnesses,

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[2] Like *Dukes*, *Ellis* and *Bennett* turn on the Rule 23(a) issues, not the Rule 23(b)(3) predominance issue present in this case. *See Dukes*, 131 S. Ct. at 2547 (addressing commonality); *Ellis*, 657 F.3d at 980-85 (addressing commonality and typicality); *Bennett*, 656 F.3d at 813 (addressing commonality).

considered 32 expert reports, and examined deposition excerpts, as well as many other documents."), *with Bennett*, 656 F.3d at 815 (listing "more than a thousand pages of expert reports, business records, sworn declarations, deposition transcripts, answers to interrogatories, and other evidentiary exhibits and materials"). Like Judge Padova, the *Bennett* district court faced contradictory factual assertions on class certification. *See, e.g.*, *Bennett*, 656 F.3d at 816 (stating that "the district court was confronted with contradictory evidence in a voluminous class certification record"). And, like the Third Circuit in this case, the Eighth Circuit applied a plain error review to affirm the district court's Rule 23 determination. *Id.* (holding that "[t]he court did not clearly err in finding [a lack of commonality]"). The chief distinguishing characteristic appears to be the outcome. After an analysis of issues pertaining to Rule 23 – the same inquiry Judge Padova conducted in this case – the *Bennett* district court denied the motion to certify while Judge Padova granted the motion to certify. But the inquiries bear no distinguishing traits.

To the extent it speaks to the contours of the "rigorous analysis" that Comcast urges the Court to probe, *Bennett* articulated the exact same "may" standard Comcast decries: "the district court *may* 'resolve disputes going to the factual setting of the case' if necessary to the class certification analysis." *Id.* at 814 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)) (emphasis added). Far from causing a split, *Bennett*, like *Hydrogen Peroxide*, falls

well within the ambit of other circuit opinions on point.

C. The common standard. The circuit courts follow a common standard for Rule 23 inquiries: District courts *must* determine that the proposed class satisfies all aspects of Rule 23, even if that requires the district court to make determinations on the merits. But the district courts *may* address only those merits issues necessary for determination of Rule 23's requirements.

That well-understood position underlies *Bennett*, *Ellis*, *Hydrogen Peroxide*, and opinions from other circuit courts, such as the Second Circuit in *In re IPO Securities Litigation*, 471 F.3d 24, 41 (2d Cir. 2006) ("With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue."), the Fourth Circuit in *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("*Eisen* simply restricts a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail ultimately on the merits. . . . Thus, while an evaluation of the merits to determine the strength of plaintiffs' case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits."), and the

Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) ("But nothing in the 1966 amendments to Rule 23, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers.").

This common standard governed both Judge Padova's evaluation of the Philadelphia class and the Third Circuit's affirmance. The Court should disregard Comcast's attempt to gin up a circuit split because none exists.

III. At bottom, Comcast disputes the district court's fact findings.

After *Hydrogen Peroxide*, Comcast demanded that the district court revisit class certification, take evidence, and make fact findings to support its Rule 23 determinations. The district court complied. Now Comcast disputes the district court's fact findings and, having its fact-based challenge rejected by the Third Circuit, seeks this Court's review. But certiorari review exists for issues bigger than a review of a trial court's fact findings. And Comcast neither has nor can show the district court committed clear error in its findings. For both reasons, the case does not merit certiorari.

Fact disputes and fact-based determinations permeate the order re-certifying the Philadelphia class. For example, Dr. McClave performed a regression

analysis using certain benchmarks and screens. P.A., at 162a-65a. But Comcast's Dr. Chipty and Dr. Teece contended that Dr. McClave selected inappropriate screens and benchmarks to the exclusion of other screens and benchmarks. P.A., at 165a-77a, 186a-87a. Judge Padova resolved each of those disputes. P.A., at 168a-69a, 174a-77a, 187a. Dr. McClave used list prices for his evaluation. P.A., at 177a. Dr. Chipty, however, argued that Dr. McClave should have used actual prices rather than list prices. P.A., at 177a-79a. Judge Padova dealt with that too. P.A., at 179a-83a. Dr. McClave evaluated the overcharge for non-basic cable for the Philadelphia class. P.A., at 183a. Dr. Chipty, here, tried to discredit Dr. McClave's model by running it on basic cable prices and comparing the results to non-basic prices. P.A., at 183a-84a. The critique failed to persuade Judge Padova. P.A., at 184a-86a. Similarly, Dr. Williams demonstrated certain aspects of antitrust impact. P.A., at 107a-09a, 123a-31a. In response, Comcast's Dr. Teece criticized Dr. Williams's economic modeling and methods. P.A., at 139a-44a. Judge Padova addressed that disagreement and found in plaintiffs' favor. P.A., at 144a-45a. And Dr. Williams compiled studies and record evidence to support his conclusion that the entire class suffered antitrust impact. P.A., at 131a-35a. Dr. Teece responded with different studies and alternate interpretations. P.A., at 139a-40a & nn.27-28. Judge Padova resolved that conflict too. P.A., at 144a-45a.

As to each of these fact disputes, Judge Padova – a judge with decades of trial experience – dug into the

record, listened to the witnesses, learned the details, asked questions, and rendered findings that plaintiffs had satisfied Rule 23(b)(3). The record reflects the district court's lengthy questioning of both sides' experts. Judge Padova's questions – to counsel and witnesses alike – reflect the depth of district court's understanding of the disputed issues and facts. And the district court's memorandum sets out, in exacting detail, each dispute, each of the district court's evaluations of key witnesses and facts, and each conclusion.

Some issues fell for plaintiffs; others for defendants. In an alternate universe, Comcast may have prevailed on enough issues to avoid class certification. But it did not. For the Court to reverse the appellate court, it would have to reach into these complicated, fact-laden questions and second guess Judge Padova's fact findings.

But Supreme Court Rule 10 cautions that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Even if it otherwise merited review, the fact-laden nature of the district court's determinations makes this case an improper vehicle for certiorari. The Court should deny Comcast's petition.

CONCLUSION

For the foregoing reasons, the court should deny Comcast's petition for a writ of certiorari.

Respectfully submitted,

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Respondents' Appendix 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLINE BEHREND, et al.	:	**CIVIL ACTION**
v.	:	
COMCAST CORPORATION, et al.	:	**NO. 03-6604**

ORDER

AND NOW, this [3rd] day of May 2007, upon consideration of Plaintiffs' Motion for Certification of the Philadelphia Class (Docket Entry 157), all responses thereto and the arguments of counsel at oral argument, **IT IS HEREBY ORDERED** as follows:

1. The Motion is **GRANTED**.

2. The Court **CERTIFIES** the following plaintiff class pursuant to Fed. R. Civ. P. 23(a) and (c)(4)(B):

> All cable television customers who subscribe or subscribed at any time since December 1, 1999 to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

For purposes of this class definition, the term "Comcast's Philadelphia cluster" is be defined to mean:

those areas covered by Comcast's cable franchises or any of its subsidiaries or affiliates, located in Philadelphia, Pennsylvania and geographically contiguous areas, or areas in close geographic proximity to Philadelphia, Pennsylvania, which is comprised of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey.

3. Plaintiffs Caroline Behrend and Stanford Glaberson are **APPOINTED** as representatives of the Philadelphia Class.

4. Pursuant to Fed. R. Civ. P. 23(g), the law firms of Heins Mills & Olson, P.L.C. and Susman Godfrey, L.L.P. are **APPOINTED** Co-Lead Counsel for the Philadelphia Class. The law firms of Kaplan Fox & Kilsheimer L.L.P., Keller Rohrback, L.L.P., and Cohen, Milstein, Hausfeld & Toll, P.L.L.C. are **APPOINTED** to serve on the Executive Committee of Plaintiffs' counsel.

BY THE COURT:

S/ John R. Padova, J.

John R. Padova, J.

Respondents' Appendix 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLINE BEHREND, et al.	:	CIVIL ACTION
v.	:	
COMCAST CORPORATION, et al.	:	NO. 03-6604

ORDER

AND NOW, this 30th day of March, 2009, upon consideration of the Defendants' Motion to Decertify Classes (Docket Entry No. 317), all responses thereto, and arguments presented at the Court's status conference of February 24, 2009, **IT IS HEREBY ORDERED** that:

1. The Motion to Decertify Classes is treated as a Motion for Reconsideration of the Court's Order of May 2, 2007 (granting Plaintiffs' Motion to Certify Philadelphia Class) and the Court's Order of October 10, 2007 (granting Plaintiffs' Motion to Certify Chicago Class).

2. The Motion, as construed, is **GRANTED IN PART AND DENIED IN PART** as follows:

    a. The Motion is **GRANTED** as to that portion of the Court's May 2, 2007 Memorandum Opinion and Order finding, pursuant to Fed. R. Civ. P. 23(b), that

Plaintiffs had demonstrated that common questions predominate.[1]

b. The Motion is **DENIED** as to all other portions of the Court's May 2, 2007 Memorandum Opinion and Order.

c. The Motion is **DENIED WITHOUT PREJUDICE** as to the Court's Order of October 10, 2007. Defendants are **GRANTED** leave to renew the Motion

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[1] On December 30, 2008, the United States Court of Appeals for the Third Circuit issued an opinion in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), determining that the "rigorous analysis" necessary when a district court decides whether to certify a Rule 23(b) class "may include a preliminary inquiry into the merits," *id.* at 317, that a district court "errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [Rule 23] requirements," *id.* at 320, and that "[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *Id.* In addition, the Court of Appeals made clear that "[r]esolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court – no matter whether a dispute might appear to implicate the 'credibility' of one or more experts. . . ." *Id.* at 324.

In our decision certifying the Philadelphia Class – issued before the *Peroxide* decision – we did not make factual findings under the preponderance of the evidence standard or resolve the experts' disputed opinions. We merely found that the Class's expert's report was sufficient to establish that common issues predominated. Because we did not require the Class to show the factual basis of its expert's opinions by a preponderance of the evidence and did not make specific credibility determinations, our finding that the Class satisfied the requirement of Rule 23(b) must be vacated.

in this regard if and when the Court's Order of November 16, 2007, staying the Chicago Class proceedings, is modified.

3. The Court's Order of May 2, 2007 is **VACATED**.

4. Plaintiffs are **GRANTED** leave to file an Amended Motion for Certification of the Philadelphia Class, as it pertains to the Fed. R. Civ. P. 23(b) issue of the predominance of the common questions of (1) antitrust impact and (2) methodology of damages, along with declarations from all witnesses Plaintiffs intend to rely upon in support thereof, by April 15, 2009.[2]

5. Defendants shall file their opposition and opposing declarations by May 6, 2009.

6. Any additional expert depositions shall be held between May 13, 2009 and May 27, 2009.

7. An evidentiary hearing on the Amended Motion shall take place on June 10-11, 2009 at 10:00 a.m. in Courtroom 17B.

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[2] In its letter to the Court dated March 25, 2009, Comcast indicates its willingness to stipulate that the only issues that need to be resolved through further class action motions practice are the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages, and that it will not seek to revisit any other class certification issue. Accordingly, the Class's Amended Motion for Certification, and the parties' declarations, need only address these discrete issues.

8. The parties shall submit a hearing memo and proposed findings of fact and conclusions of law pertinent to the Rule 23(b) issue by June 3, 2009.

BY THE COURT:

s/ John R. Padova, J.
John R. Padova, J.

Respondents' Appendix 7

[Handout expressing the Rule 23 hearing's standard, provided October 9, 2009, from Judge Padova to parties for comment in pre-hearing conference.]

Plaintiff's burden at the class certification stage is not to prove the element of antitrust impact. Plaintiff's task at the class certification stage is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class, rather than individual to its members. This calls for the District Court to employ a rigorous assessment of the available evidence and the method by which plaintiffs propose to use the evidence to prove impact at trial. Factual determinations must be made by a preponderance of the evidence. A District Court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23. District Courts must resolve factual disputes by a preponderance of the evidence and make a finding that each Rule 23 requirement is met.

REPLY BRIEF

RECORD
AND
BRIEFS

No. 11-864

Supreme Court, U.S.
FILED
APR 2 4 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COMCAST CORPORATION,
COMCAST HOLDINGS CORPORATION,
COMCAST CABLE COMMUNICATIONS, INC.,
COMCAST CABLE COMMUNICATIONS HOLDINGS, INC.,
AND COMCAST CABLE HOLDINGS, LLC,

Petitioners,

v.

CAROLINE BEHREND, STANFORD GLABERSON,
JOAN EVANCHUK-KIND, AND ERIC BRISLAWN,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The Third Circuit in this case expressly declined to consider "merits arguments" bearing directly on the propriety of class certification. Pet. App. 19a. Since that approach is irreconcilable with the one endorsed just last Term in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), Plaintiffs are forced to engage in misdirection, repeatedly emphasizing such irrelevancies as the amount of attention devoted by the district court to the certification issue or the state of Third Circuit law before *Dukes* and the decision below. Plaintiffs rely on these smokescreens because they cannot explain or deny the central points of Comcast's petition: The decision below cannot be reconciled with *Dukes*, and gives rise to a circuit split with the Eighth and Ninth Circuits.

Plaintiffs assert that the district judge invoked his "decades of trial experience" to "rende[r] findings that [they] had satisfied Rule 23(b)(3)," and that Comcast simply "disputes the district court's fact findings." Opp. 23-25. The issue here is not whether the district court made "findings," voluminous or otherwise, but whether the Third Circuit's conclusion that class certification was appropriate is legally defective and flatly contrary to *Dukes*. As *Dukes* itself illustrates, the Court has not shied away from ensuring that the lower courts faithfully apply Rule 23, even where the certification issue turns on voluminous fact and expert evidence. And Rule 23(f) authorizes *appellate* review of certification orders precisely to ensure that such orders comport with the record and the law.

The Third Circuit, after agreeing to review the district court's certification order, erroneously con-

cluded that it was unable even to *consider* Comcast's arguments that individual inquiries into the relevant geographic market, antitrust injury, and damages would overwhelm any purportedly common issues. *See* Pet. App. 19a, 28a-29a, 47a-48a. Because the Third Circuit's job is to review whether the district court was *correct*, it is hardly a defense of the decision below to claim that the district court did decide some of those issues.

The issue before this Court is not (just) whether the Third Circuit reached the correct resolution of the predominance inquiry, but whether it undertook the correct inquiry *at all*. The Third Circuit erred in refusing to consider or decide whether common issues predominate, and that error warrants review and reversal regardless of how the predominance issue ultimately is resolved. That is also a purely legal issue regarding the proper interpretation and application of Rule 23. *See Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622-25 (1997). And this Court need not "reach into ... complicated, fact-laden questions" (Opp. 25) to conclude that the *courts of appeals* must do so—even when those questions also bear on the merits of the case.

Plaintiffs also maintain that the Court's review is unnecessary because a *different* decision from a different panel of the Third Circuit—*In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008)—supposedly "embodies the Court's demands for Rule 23." Opp. 2. Indeed, they go so far as to claim there is no circuit conflict ... involving *Hydrogen Peroxide*. *Id.* at 18. Even before *Dukes* was decided, Comcast had relied on *Hydrogen Peroxide* and other cases to argue that the Third Circuit was required to resolve all "merits" issues relevant to class

certification, *see*, *e.g.*, C.A. Reply Br. 27-28, and the Third Circuit's refusal to do so is indeed difficult to square with its earlier decisions. The basis for this Court's review, however, is not the Third Circuit's willingness to depart from its own precedents, but rather its demonstrable infidelity to *Dukes* (and the circuit split that it engendered in the process) in this most recent, and post-*Dukes*, decision. *See* Pet. App. 41a n.12.

The extent to which courts must resolve "merits" issues at the class-certification stage is an exceptionally important question, not least because those issues so "[f]requently" bear on the propriety of certification. *Dukes*, 131 S. Ct. at 2551; *see also* Pet. 26-28. Although *Dukes* squarely held that courts may not decline to consider issues bearing on class certification simply because they are also relevant to the merits of the plaintiff's case, that is precisely what the Third Circuit did below. This Court's review is warranted.*

I. THE DECISION BELOW CONFLICTS WITH *WAL-MART STORES, INC.* v. *DUKES*

Plaintiffs attempt to reconcile the decision below with *Dukes* in two respects. They claim initially that

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* Plaintiffs claim in a footnote that Comcast is adopting an "inconsistent positio[n]" before this Court than it had advanced below by "contend[ing] that *Judge Padova* applied an incorrect standard." Opp. 13 n.1 (emphasis added). But Comcast is challenging the *Third Circuit*'s incorrect belief that it could not resolve "merits" issues bearing on the certification inquiry. *See*, *e.g.*, Pet. App. 47a-48a. And, in any event, Plaintiffs' argument comes too late: They did not argue, nor did the Third Circuit conclude, that Comcast had waived *any* of its arguments that the evidence presented by Plaintiffs was insufficient to establish predominance.

the Third Circuit did not resurrect limitations on review of "merits" issues at the certification stage that some courts had thought, before *Dukes*, to have been required by *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). Opp. 2. Then, somewhat inconsistently, they maintain that the Third Circuit properly understood *Eisen* as "preclud[ing] only a merits inquiry that is not necessary to determine a Rule 23 requirement," and that resolution of the issues presented by Comcast was "unnecessary for the Rule 23(b)(3) predominance questions presented below." *Id.* at 16 (internal quotation marks and emphasis omitted). Neither attempt to rationalize the Third Circuit's decision has merit.

A. Plaintiffs maintain that "at no point did the Third Circuit attempt to 'resuscitate' an incorrect interpretation of *Eisen*." Opp. 2 (quoting Pet. 3). But the Third Circuit *admitted* that it was doing so. According to the Third Circuit, *Dukes* "confirmed" that "'[f]requently [the Rule 23] "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim,' *but* Eisen *still prohibits 'a merits inquiry for any other pretrial purpose*.'" Pet. App. 14a n.6 (emphasis added). This selective quotation from *Dukes* gets the analysis backwards: The Court in *Dukes* held that *Eisen* does not impose *any* limitation on the "merits inquiry" undertaken by courts in ruling on class-certification motions.

The Court had stated in *Eisen* that "nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. But, as the Court noted in *Dukes*, "the judge [in *Eisen*] had conducted a preliminary inquiry into

the merits of a suit, not in order to determine the propriety of certification" under Rule 23, "but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants." 131 S. Ct. at 2552 n.6. "To the extent the quoted statement goes beyond the permissibility of *a merits inquiry for any other pretrial purpose*," the Court emphasized, "it is the purest dictum and is contradicted by our other cases." *Ibid.* (emphasis added).

This Court's reference to "any other pretrial purpose" (131 S. Ct. at 2552 n.6) clearly refers to purposes *other than ruling on class certification*. After *Dukes*, therefore, *Eisen*'s statement regarding preliminary inquiries into the merits is no longer good law in the class-certification context. And that is exactly why this Court in *Dukes* resolved the certification issue presented in that case by evaluating the strength of the proffered evidence that Wal-Mart operated under a generally applicable policy of discrimination, even though that issue "necessarily overlap[ped] with [the plaintiffs'] merits contention that Wal-Mart engage[d] in a pattern or practice of discrimination." *Id.* at 2552 (emphasis omitted). Yet the Third Circuit nonetheless expressly invoked and relied upon *Eisen* (no fewer than six times) to justify its crabbed view of the issues properly before it at the certification stage—"[t]o require more" from the plaintiffs, it insisted, would "contraven[e] *Eisen*." Pet. App. 33a.

The Third Circuit believed that its reliance on *Eisen* was warranted because, in its view, permitting "merits" inquiries at the class-certification stage "would turn class certification into a trial" and "would run 'dangerously close to stepping on the toes of the Seventh Amendment.'" Opp. 10 (quoting Pet.

App. 28a, 33a-34a). But *Dukes* squarely held that plaintiffs must *prove* any contention bearing on the propriety of certification, even if "they will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." 131 S. Ct. at 2552 n.6. This requirement does not impinge on any Seventh Amendment rights because "any findings for the purpose of class certification 'do not bind the fact-finder on the merits.'" Pet. App. 14a (quoting *Hydrogen Peroxide*, 552 F.3d at 318); *see also In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). And even if the Third Circuit panel majority and the class-action bar (Pet. App. 34a n.10) would prefer an approach that simply accepts plaintiffs' submissions without further inquiry, this Court has chosen a different system. *See Dukes*, 131 S. Ct. at 2551 ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification ... must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."). The decision below cannot be reconciled with *Dukes*.

B. Plaintiffs also acknowledge that the Third Circuit applied *Eisen* but contend, apparently in the alternative, that it did so correctly. Echoing the Third Circuit's claim that "'*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement,'" Plaintiffs insist that the Third Circuit declined to require proof only of "non-Rule 23 issues" that were "unnecessary for the Rule 23(b)(3) predominance questions" before the court. Opp. 15-16 (quoting Pet. App. 14a) (emphasis omitted). This argument falters at the outset: *Dukes* leaves no room for any application of *Eisen* to the class-certification inquiry. But in any event, Plaintiffs are mistaken.

The Third Circuit failed to consider Comcast's arguments not because it deemed them irrelevant to the class-certification inquiry, but instead because they were "merits arguments" that were not "properly before [the court]." Pet. App. 19a (relevant geographic market). Based on its apparent view that *Eisen* does not require Plaintiffs to prove any merits contentions at the certification stage, the court declined to resolve each of the "evidentiary" disputes raised by Comcast. *Id.* at 28a (antitrust impact). And, most tellingly, the Third Circuit insisted that Comcast's "attacks on the merits of the methodology" offered by Plaintiffs' experts "have no place in the class certification inquiry," because "[w]e have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." *Id.* at 47a-48a (damages).

If the Third Circuit had believed that Comcast's arguments were irrelevant to the class-certification inquiry, it could (and would) simply have said so. It did not (and could not), however, because each of the points raised by Comcast bears directly on the propriety of certification. *See* Pet. 19-22.

- If Plaintiffs were unable to prove that the relevant geographic market for assessing their antitrust claims was the entire Philadelphia DMA, then it would be impossible to assess their claims on a class-wide basis; rather, the court would be required to conduct individual inquiries into Comcast's alleged market power in a variety of markets within that DMA. *See, e.g.*, *Heerwagen* v. *Clear Channel Commc'ns*, 435 F.3d 219, 229 (2d Cir. 2006) (affirming denial of class certification "[i]n light of ... substantial non-common issues regarding market power").

- If Plaintiffs were unable to establish that deterred entry by overbuilders resulted in higher prices for the entire class, then individual inquiries into antitrust impact in particular counties or regions would similarly preclude class certification. *See, e.g., In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) ("In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.").
- And if Plaintiffs were unable to provide a viable model for quantifying damages on a class-wide basis, then individual inquiries into alleged damages across the range of Comcast's franchise areas would overwhelm any purportedly common issues in the case. *See, e.g., Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 304 (5th Cir. 2003) (denying certification of an antitrust class action because of the "need for such individualized inquiries" on damages).

Indeed, even the Third Circuit apparently recognized that the Plaintiffs could not obtain class certification unless they established a class-wide measure of damages: "To satisfy ... the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a. In practically the same breath, however, the court claimed that "[w]e have not reached the stage of determining on the merits whether the [damages] methodology [offered by Plaintiffs] is a just and reasonable inference or speculative." *Id.* at 47a. Plaintiffs' assertion that the Third Circuit declined to resolve only issues that were irrelevant to the class-certification inquiry

is thus belied by the very decision that they try, unsuccessfully, to explain away.

II. The Decision Below Creates A Split With The Eighth And Ninth Circuits

Ellis v. *Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), and *Bennett* v. *Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), correctly interpret *Dukes* as requiring resolution of all merits issues bearing on class certification. *See* Pet. 22-25. Plaintiffs are unable to reconcile the Third Circuit's decision below with either *Ellis* or *Bennett*; indeed, they do not even try. Plaintiffs instead pretend that the asserted conflict is not with the decision below, but instead with the Third Circuit's pre-*Dukes* decision in *Hydrogen Peroxide*. *See* Opp. 18 ("*Ellis* and *Hydrogen Peroxide*"); *id.* at 20 ("*Bennett* and *Hydrogen Peroxide*"). Remarkably, they even extract quotations from Comcast's petition that plainly refer to the decision below and claim that Comcast instead was criticizing *Hydrogen Peroxide*. *Compare*, *e.g.*, Opp. 20 ("Comcast ... claim[s] that *Hydrogen Peroxide* 'cannot be reconciled with the Eighth Circuit's opinion'") *with* Pet. 24 ("The Third Circuit's decision similarly cannot be reconciled with the Eighth Circuit's opinion ...").

The petition, however, leaves no doubt that this Court's review is warranted because the Third Circuit's position *in the decision below* departs from that of its sister circuits: "The Third Circuit's view that 'merits arguments' are 'not properly before [the court]' at the class certification stage ... breaks sharply with the Eighth and Ninth Circuits." Pet. 2 (quoting Pet. App. 19a). It is hardly relevant in evaluating that circuit split whether *previous* Third Circuit decisions, not before the Court, could perhaps

have been reconciled with those of the Eighth and Ninth Circuits.

Not only do Plaintiffs mischaracterize the nature of the conflict, their discussion of the issue all but ignores the Third Circuit's decision in this case. The passage addressing the conflict between the Third and Ninth Circuits does not contain even a single mention—let alone citation—of the decision below. *See* Opp. 18-20. Instead, Plaintiffs claim only that "Judge Padova took the step missing in *Ellis* and 'judg[ed] the persuasiveness of the evidence presented,'" *id.* at 19 (quoting *Ellis*, 657 F.3d at 982), and that "the approach in *Ellis* ... stands shoulder to shoulder with Judge Padova's approach, the Third Circuit's guidance on Rule 23, and this Court's precedents in *Falcon* and *Dukes*," *id.* at 20. They could hardly claim as much for the decision below, which expressly disavowed any authority to "judg[e] the persuasiveness of the evidence presented." *Ellis*, 657 F.3d at 982; *see, e.g.*, Pet. App. 47a-48a.

Plaintiffs' discussion of the conflict between the Third and Eighth Circuits similarly does not attempt to explain how the decision below is consistent with *Bennett*. They claim only that, "like the Third Circuit in this case, the Eighth Circuit applied a plain error review to affirm the district court's Rule 23 determination." Opp. 21. Even the Third Circuit did not believe the standard of review was plain error, *see* Pet. App. 10a-12a, but the fact that the Third Circuit reviewed and affirmed the district court's decision says nothing about whether it resolved any "merits" issues bearing on the correctness of that decision. And on that point, Plaintiffs assert only that Judge Padova—not the Third Circuit—"conducted in

this case" the same "analysis of issues pertaining to Rule 23" as the Eighth Circuit in *Bennett*. Opp. 21.

The absence of any meaningful attempt to reconcile the decision below with *Ellis* and *Bennett* makes clear that, just as Comcast argued in its petition, they are irreconcilable. And the circuit split has only deepened since the petition was filed.

In *Messner* v. *Northshore University HealthSystem*, the Seventh Circuit cited the decision below in vacating the denial of class certification in an antitrust class action. 669 F.3d 802, 822-23 (7th Cir. 2012). But even in doing so, the court rejected *exactly* the sort of limitation imposed below on the review of "merits" issues at the certification stage. Specifically, the Seventh Circuit acknowledged that it *would* be an "appropriate and limited use of merits evidence at the certification stage" for the defendants "to argue that [an expert's] methodologies were flawed." *Id.* at 823. The defendants, however, had "waiv[ed] that argument on appeal." *Id.* at 824.

The Seventh Circuit's conclusion that it would be "appropriate" to decide at the class-certification stage whether an expert's theories are "flawed" (669 F.3d at 823) accords with the post-*Dukes* decisions from the Eighth and Ninth Circuits, but is flatly inconsistent with the Third Circuit's belief that it was precluded from considering "whether the [damages] methodology [offered by Plaintiffs] is a just and reasonable inference or speculative." Pet. App. 47a. And that conflict warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 24, 2012

JOINT APPENDIX

REC
AN
BRIEF

Supreme Court, U.S.
FILED
AUG 17 2012
OFFICE OF THE CLERK

No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,

Petitioners,

v.

CAROLINE BEHREND, ET AL.,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

JOINT APPENDIX
Volume 1 of 5
(Pages 1a-401a)

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 11, 2012
CERTIORARI GRANTED JUNE 25, 2012

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General Docket
Third Circuit Court of Appeals

Court of Appeals Docket #: 10-2865	**Docketed:**
Nature of Suit: 3410 Antitrust	06/25/2010
Caroline Behrend, et al v. Comcast	**Termed:**
Corp, et al	08/23/2011
Appeal From: United States District Court for the Eastern District of Pennsylvania	
Fee Status: Paid	

Case Type Information:
1) civil
2) private
3) Federal question

Originating Court Information
District: 0313-2 : 2-03-cv-06604
Court Reporter: Joan Carr
Trial Judge: John R Padova, U.S. District Judge
Date Filed: 12/08/2003

Date Order/ Judgment:	**Date Order/ Judgment EOD:**	**Date NOA Filed:**
01/13/2010	01/13/2010	06/18/2010

Prior Cases:
None

Current Cases:
None

* * *

06/25/2010	CIVIL CASE DOCKETED. Notice filed by Appellants Comcast Cable Comm, Comcast Cable Communications Holdings, Inc., Comcast Cable Holdings, LLC, Comcast Corp and Comcast Holding Corp in District Court No. 2-03-cv-06604. Case transferred from Misc. Docket No. 10-8009. (SMW)

* * *

08/23/2011	PRECEDENTIAL OPINION Coram: FISHER, JORDAN and ALDISERT, Circuit Judges. Judge: ALDISERT Authoring, Judge: JORDAN Concurring & dissenting. (SMW)
08/23/2011	JUDGMENT, Affirmed. Costs taxed against Appellant. (SMW)

* * *

09/20/2011	ORDER (MCKEE, Chief Judge, SLOVITER, SCIRICA, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, VANASKIE, and ALDISERT*, Circuit Judges) Denying Petition for Rehearing filed by Appellants Comcast Corp, Comcast Cable Comm, Comcast Cable Communications Holdings, Inc., Comcast Holding Corp and Comcast Cable Holdings, LLC, filed. Ruggero J. Aldisert*, Authoring Judge. *As to panel reharing only. (SMW)
09/28/2011	MANDATE ISSUED, filed. (PDB)

* * *

United States District Court
Eastern District of Pennsylvania
(Philadelphia)
CIVIL DOCKET FOR CASE #: 2:03-cv-06604-JP

BEHREND et al v. COMCAST CORPORATION
Assigned to: HONORABLE JOHN R. PADOVA

Date Filed: 12/08/2003
Jury Demand: Plaintiff
Nature of Suit: 410 Anti-Trust
Jurisdiction: Federal Question

related Cases: 2:07-cv-00219-JP
2:07-cv-00218-JP
Case in other court: USCA, 04-04330
USCA for the 3rd Circuit, 06-01908
USCA Third Circuit, 10-02865
Cause: 15:1 Antitrust Litigation

* * *

Date Filed	#	Docket Text
12/08/2003	1	COMPLAINT against COMCAST CORPORATION (Filing fee $ 150 receipt number 900106.), filed by ANDREW BEHREND, MARC DAMBROSIO, STANFORD GLABERSON, KENNETH SAFFREN, MARC WEINBERG.(tj,) (Entered: 12/09/2003)

* * *

05/23/2006	133	THIRD AMENDED COMPLAINT AGAINST

		COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION FILED BY STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, LAWRENCE RUDMAN, MICHAEL KELLMAN, CAROLINE BEHREND, CERTIFICATE OF SERVICE.(ac,) (Entered: 05/24/2006)

* * *

09/21/2006	157	MOTION to Certify Class *Motion for Certification of the Philadelphia Class* filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, LAWRENCE RUDMAN, MICHAEL KELLMAN, CAROLINE BEHREND. Certificate of Service. (Attachments: # 1 Proposed Order)(WOODWARD, DAVID) (Entered: 09/21/2006)
09/21/2006	158	Memorandum in Support re 157 MOTION to Certify Class *Motion for Certification of the Philadelphia Class (Supplemental Memo-*

		randum) filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, LAWRENCE RUDMAN, MICHAEL KELLMAN, CAROLINE BEHREND. (WOODWARD, DAVID) (Entered: 09/21/2006)
09/21/2006	159	Declaration re 157 MOTION to Certify Class *Motion for Certification of the Philadelphia Class (Updated Declaration of John C. Beyer, Ph.D., Regarding Class Certification)* by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, LAWRENCE RUDMAN, MICHAEL KELLMAN, CAROLINE BEHREND. (WOODWARD, DAVID) (Entered: 09/21/2006)

* * *

11/09/2006	176	Memorandum in Opposition re 157 MOTION to Certify Class filed by COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS

		CORPORATION, Certificate of Service. (Attachments: # 1 Exhibit A (Declaration of Richard N. Palmer) # 2 Exhibit B (Declaration of Mary Kane) # 3 Exhibit C (Declaration of James T. Cain, Esquire) # 4 Exhibit D (Expert Report))(LECKERMAN, JASON) Modified on 11/13/2006 (cdd,). (Entered: 11/09/2006)

* * *

12/04/2006	184	REPLY to Response to Motion re 157 MOTION to Certify Class *Motion for Certification of the Philadelphia Class (Plaintiffs' Reply in Support of Plaintiffs' Motion for Class Certification)* filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, LAWRENCE RUDMAN, MICHAEL KELLMAN, CAROLINE BEHREND. (WOODWARD, DAVID) (Entered: 12/04/2006)
12/04/2006	185	AFFIDAVIT in Support re 157 MOTION to Certify Class *Motion for Certification of the Philadelphia Class (Declaration of John C. Beyer, Ph.D., in Response to Expert Report of Dr. Stanley M. Besen Regarding Class Certifica-*

		tion) filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, LAWRENCE RUDMAN, MICHAEL KELLMAN, CAROLINE BEHREND. (WOODWARD, DAVID) (Entered: 12/04/2006)
12/04/2006	186	AFFIDAVIT in Support re 157 MOTION to Certify Class *Motion for Certification of the Philadelphia Class (Declaration of Jessica N. Servais in Support of Plaintiffs' Motion for Class Certification)* filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, LAWRENCE RUDMAN, MICHAEL KELLMAN, CAROLINE BEHREND. (Attachments: # 1 Exhibit A Besen Deposition # 2 Exhibit B Part 1 Kane Deposition # 3 Exhibit B Part 2 Kane Deposition # 4 Exhibit B Part 3 Kane Deposition # 5 Exhibit C Behrend Deposition # 6 Exhibit D Glaberson Deposition Excerpts# 7 Exhibit E, D. Mass. Order dated 5/18/06) (WOODWARD, DAVID) (Entered: 12/04/2006)

* * *

01/04/2007	190	ANSWER to Amended Complaint by COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION.(LECKERMAN, JASON) (Entered: 01/04/2007)

* * *

02/13/2007	192	NOTICE of Oral Argument on Motion 157 MOTION to Certify Class *Motion for Certification of the Philadelphia Class* : ORAL ARGUMENT SET FOR 3/14/2007 02:00 PM IN COURTROOM 17B BEFORE HONORABLE JOHN R. PADOVA.(gk,) (Entered: 02/13/2007)
03/15/2007	193	Minute Entry for proceedings held before Judge JOHN R. PADOVA : Argument Hearing held on 03/14/07. Court Reporter: ESR. (ac,) (Entered: 03/15/2007)
03/20/2007	194	TRANSCRIPT of Proceedings held on 3/14/07 before Judge PADOVA. Court Reporter: JENNIFER CABRERA. ORAL ARGUMENT (jl,) (Entered: 03/20/2007)
05/03/2007	195	ORDER THAT PLAINTIFFS'

		MOTION FOR CERTIFICATION OF THE PHILDELPHIA CLASS IS GRANTED, ETC. SIGNED BY JUDGE JOHN R. PADOVA ON 05/02/07.05/03/07 ENTERED AND COPIES MAILED AND E-MAILED.(ac,) (Entered: 05/03/2007)

* * *

02/20/2009	317	MOTION De-Certification of Classes filed by COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION.Motion to De–Certify Classes.(RUBLIN, BURT) Modified on 3/31/2009 (ti,). (Entered: 02/20/2009)

* * *

03/09/2009	323	RESPONSE in Opposition re 317 MOTION De–Certification of Classes *PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DECERTIFY CLASSES* filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN

		EVANCHUK-KIND, CAROLINE BEHREND. (Attachments: # 1 Text of Proposed Order)(WOODWARD, DAVID) (Entered: 03/09/2009)
03/16/2009	324	Reply Memorandum in Support re 317 MOTION De-Certification of Classes filed by COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION, Certificate of Service. (RUBLIN, BURT) Modified on 3/17/2009 (nd,). (Entered: 03/16/2009)

* * *

03/30/2009	326	ORDER THAT THE MOTION TO DECERTIFY CLASSES IS TREATED AS A MOTION FOR RECONSIDERATION OF THE COURT'S ORDERS DATED 5/2/2007 &10/10/2007. THE MOTION, AS CONSTRUCTED IS GRANTED IN PART AND DENIED IN PART; THE MOTION IS GRANTED AS TO A PORTION OF THE COURT'S 5/2/2007 MEMORANDUM AND ORDER. THE MOTION IS DENIED AS TO ALL OTHER

		PORTIONS OF THE COURT'S MEMORANDUM AND ORDER. THE MOTION IS DENIED WITHOUT PREJUDICE AS TO THE COURT'S ORDER OF 10/10/2007. DEFENDANTS ARE GRANTED LEAVE TO RENEW THE MOTION IN THIS REGARD. THE COURT'S ORDER OF 5/2/2007 IS VACATED. PLAINTIFFS ARE GRANTED LEAVE TO FILE AN AMENDED MOTION FOR CERTIFICATION OF THE PHILADELPHIA CLASS BY 4/15/2009. DEFENDANTS SHALL FILE THEIR OPPOSITION AND OPPOSING DECLARATIONS BY 5/6/2009. ANY ADDITIONAL EXPERT DEPOSITIONS SHALL BE HELD BETWEEN 5/13/2009 AND 5/27/2009. SIGNED BY HONORABLE JOHN R. PADOVA ON 3/30/09. 3/31/09 ENTERED AND COPIES MAILED, E-MAILED AND FAXED BY CHAMBERS.(ti,) (Entered: 03/31/2009)

* * *

04/10/2009	391	Report of DR. TASNEEM CHIPTY by COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC,

		COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION. (FILED UNDER SEAL) (ti,) (Entered: 09/23/2009)
04/10/2009	392	Report of DAVID J. TEECE, Ph.D. by COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION. (FILED UNDER SEAL) (ti,) (Entered: 09/23/2009)

* * *

04/15/2009	330	Amended MOTION to Certify Class *Plaintiffs' Amended Motion for Certification of the Philadelphia Class* filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND.Certificate of Service. (Attachments: # 1 Text of Proposed Order)(WOODWARD, DAVID) (Entered: 04/15/2009)
04/15/2009	331	MEMORANDUM In Support of

		Plaintiffs' Amended MOTION for Certification of the Philadelphia Class by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 04/16/2009)

* * *

04/22/2009	336	Expert Declaration of Michael A. Williams, Ph.D. by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 04/23/2009)

* * *

05/06/2009	344	Memorandum in Opposition together with Supporting Documents, Certificate of Service filed by COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION. (FILED UNDER SEAL) (ti,) (Entered: 05/07/2009)
05/07/2009	345	NOTICE of Filing of Corrected

		Expert Declaration by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 05/08/2009)

* * *

05/11/2009	348	DEFENDANTS' EXPERT REBUTALL REPORTS. (FILED UNDER SEAL) (jl,) (Entered: 05/12/2009)
05/12/2009	349	Expert Rebuttal Declaration by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 05/13/2009)

* * *

05/12/2009	351	Expert Reply Declaration by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. FILED UNDER SEAL) (ti,) (Entered: 05/13/2009)

* * *

05/26/2009	357	Class Certification Reply Declaration by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND,

		CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 05/27/2009)
05/26/2009	358	Class Certification Reply Declaration by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 05/27/2009)
05/26/2009	359	Expert Class Certification Reply Declaration by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 05/27/2009)

* * *

06/03/2009	365	PRE-HEARING BRIEF in Support filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 06/04/2009)
06/03/2009	366	Declaration by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered:

		06/04/2009)
06/03/2009	367	Proposed Findings of Fact and Conclusions of Law by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL)(ti,) (Entered: 06/04/2009)

* * *

09/14/2009	383	Supplemental Declaration of Dr. James T. McClave by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 09/15/2009)
09/14/2009	384	Supplemental Expert Declaration of Michael A. Williams, PhD. by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 09/15/2009)
09/14/2009	385	Declaration of James Levinsohn by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 09/15/2009)
09/14/2009	386	Supplemental Expert Reply Dec-

		laration of Dr. Hal Singer by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 09/15/2009)

* * *

10/06/2009	397	SUPPLEMENTAL Pre-Hearing Brief in Support of Class Amended Motion for Certification, Certificate of Service filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL)(ti,) (Entered: 10/07/2009)
10/06/2009	398	Proposed Findings of Fact and Conclusions of Law by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL)(ti,) (Entered: 10/07/2009)

* * *

10/14/2009	407	Minute Entry for proceedings held before HONORABLE JOHN R. PADOVA: Motion Hearing held on 10/13/09 Court Reporter: Jenniffer Cabrera. (ti,) (Entered: 10/14/2009)

* * *

10/15/2009	409	Minute Entry for proceedings held before HONORABLE JOHN R. PADOVA: Argument (Class Certification) held on 10/14/09 Court Reporter: Jenniffer Cabrera. (ti,) (Entered: 10/15/2009)

* * *

10/19/2009	411	Minute Entry for proceedings held before HONORABLE JOHN R. PADOVA: Motion Hearing held on 10/15/09 Court Reporter: Jenniffer Cabrera. (ti,) (Entered: 10/19/2009)

* * *

10/22/2009	419	RESPONSE in Opposition to Defendants' MOTION for Judgment on Partial Findings Pursuant to Federal Rule of Civil Procedure 52(C) filed by STANFORD GLABERSON, ERIC BRISLAWN, JOAN EVANCHUK-KIND, CAROLINE BEHREND. (FILED UNDER SEAL) (ti,) (Entered: 10/23/2009)
10/23/2009	421	DECLARATIONS and SUPPLEMENTAL DECLARATIONS of Dr. Tasneem Chipty, Jonathan Orszag, Robert Willig, and David J. Teece, Ph.D., filed by COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC,

		COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION. (FILED UNDER SEAL) (md) (Entered: 10/26/2009)

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10/29/2009	423	Minute Entry for proceedings held before HONORABLE JOHN R. PADOVA: Motion Hearing held on 10/26/09 Court Reporter: Jennifer Cabrera. (ti,) (Entered: 10/29/2009)

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10/29/2009	425	TRANSCRIPT of Proceedings held on 10/13/09 to 10/15/09 before Judge John R. Padova. Court Reporter: Jenniffer Cabrera. (ti,) (Entered: 10/29/2009)

* * *

11/18/2009	427	Minute Entry for proceedings held before HONORABLE JOHN R. PADOVA: Argument (Class Certification) held on 11/16/09. Court Reporter: Jenniffer Cabrera. (ti,) (Entered: 11/19/2009)
11/20/2009	428	TRANSCRIPT of Proceedings held on 11/16/09 before Judge PADOVA. Court Reporter: JEN CABRERA. HEARING (jl,) (En-

		tered: 11/20/2009)

* * *

01/07/2010	430	MEMORANDUM AND/OR OPINION SIGNED BY HONORABLE JOHN R. PADOVA ON 1/7/10. 1/7/10 ENTERED AND COPIES MAILED, E–MAILED.(ti,) (Entered: 01/07/2010)
01/07/2010	431	ORDER THAT UPON CONSIDERATION OF PLAINTIFFS' AMENDED MOTION FOR CERTIFICATION OF THE PHILADELPHIA CLASS 330 , IT IS HEREBY ORDERED THE MOTION IS GRANTED. DEFENDANTS' MOTION FOR PARTIAL FINDINGS PURSUANT TO FED. R. CIV. P. 52(c) 412 , IS DENIED. PLAINTIFFS' MOTION TO SEAL DOCUMENT 418 , IS GRANTED. SIGNED BY HONORABLE JOHN R. PADOVA ON 1/7/10. 1/7/10 ENTERED AND COPIES MAILED, E–MAILED.(ti,) (ORDER VACATED PER ORDER #432) (Entered: 01/07/2010)
01/13/2010	432	ORDER THAT THE COURT'S ORDER OF 1/7/2010 430 , IS VACATED. PURSUANT TO

		FED. R. CIV. P. 23(g), THE LAW FIRMS OF HEINS MILLS &OLSON, P.L.C. AND SUSMAN GODFREY, L.L.P. ARE APPOINTED CO-LEAD COUNSEL FOR THE PHILADELPHIA CLASS; DEFENDANTS' MOTION FOR PARTIAL FINDINGS PURSUANT TO FED.R.CIV.P.52(c) 412 , IS DENIED. PLAINTIFFS' MOTION TO SEAL DOCUMENT 418 , IS GRANTED. SIGNED BY HONORABLE JOHN R. PADOVA ON 1/13/10. 1/13/10 ENTERED AND COPIES MAILED, E-MAILED.(ti,) (Entered: 01/13/2010)

* * *

06/09/2010	454	USCA ORDER that the petition for leave to appeal is hereby GRANTED. The motions to file appendices and to file appendices under seal are hereby GRANTED. (ti,) (Entered: 06/09/2010)
06/09/2010		NOTICE OF APPEAL by COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CABLE COMMUNICATIONS, INC., COMCAST CABLE

		HOLDINGS, LLC, COMCAST CORPORATION, COMCAST HOLDINGS CORPORATION. Filing fee $ 455, receipt number 024981. Copies to Judge, Clerk USCA, Appeals Clerk and Counsel. (See Paper 454 Original Pleading and PDF) (ti,) (Entered: 06/21/2010)
06/18/2010	455	Clerk's Notice to USCA re Notice of Appeal, : (ti,) (Entered: 06/21/2010)
06/25/2010		NOTICE of Docketing Record on Appeal from USCA re Notice of Appeal, filed by COMCAST CABLE COMMUNICATIONS, INC., COMCAST HOLDINGS CORPORATION, COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., COMCAST CORPORATION, COMCAST CABLE HOLDINGS, LLC. USCA Case Number 10–2865 (ti,) (Entered: 06/25/2010)
07/22/2010	456	Copy of TPO Form re Notice of Appeal, ;(ti,) (Entered: 07/22/2010)
07/26/2010		Record Complete for Purposes of Appeal re Notice of Appeal,. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (afm,) (Entered:

		07/26/2010)

* * *

09/28/2011	462	ORDER of USCA that This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvnaia and was argued on 1/11/2011. On consideration whereof, it is now hereby ADJUDGED and ORDERED that the order of the District Court entered 1/13/2010, be and the same is hereby affirmed. All of the above in accordance with the Opinion of the Court. Costs taxed against Appellant. (ti,) (Entered: 09/28/2011)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Caroline Behrend, Stanford Glaberson Michael Kellman, Lawrence Rudman, Joan Evanchuk-Kind and Erie Brislawn, Plaintiffs, v. Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC, Defendants.	No. 03-6604 The Honorable John R. Padova **THIRD AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE SHERMAN ANTITRUST ACT**

Plaintiffs, on their own behalf and on behalf of the Classes of those similarly situated, bring this action for treble damages under the antitrust laws of the United States against Defendants, including Defendant Comcast Corporation and its subsidiaries, affiliates and predecessors and its predecessors' subsidiaries and affiliates (collectively referred to as "Comcast"). "Defendants" includes both Comcast, and AT&T Corporation's cable businesses ("AT&T"), which are now merged with Comcast.

INTRODUCTION

1. This class action challenges illegal conduct by the Defendants designed to eliminate and prevent competition in the cable industry, in violation of Sections 1 and 2 of the Sherman Act. Deregulation of the cable markets in the 1990s by Congress was intended to end exclusive cable franchises and bring about competition in the cable industry. But Defendants and other large cable companies have avoided competing with one another by allocating the nation's regional markets among themselves. Defendants and other cable companies have accomplished this division of markets through a series of transactions in which they have acquired competitors and then "swapped" customers in one geographic area for customers in another, thereby "clustering" their cable systems in particular regions. These actions have allowed them to acquire or maintain monopoly power in particular geographic clusters, including the Philadelphia, Pennsylvania and Chicago, Illinois clusters. Having moved out of the clusters of competitors, and arranged for the departure of competitors from their own clusters, the cable companies are freed from the threat of actual or potential competition from other cable providers in those markets. The result is that regional markets remain dominated by a single cable provider, with no effective competition.

2. This conduct has allowed cable companies, including Defendants, to acquire or maintain monopoly power in regional markets, engage in anticompetitive conduct, charge supra-competitive prices, and limit choice for cable consumers to effectively the only game in town – the cable services of the "cluster" monopoly cable company. This

lawsuit challenges the horizontal allocation of markets and the willful acquisition and maintenance of monopoly power by the Defendants in the Philadelphia and Chicago regional cable markets.

3. Even before the Class Period began and continuing during the Class Period, Defendants, including Comcast and AT&T, made massive purchases of cable systems and cable subscribers from their competitors, resulting in the willful acquisition and maintenance of monopoly power in the Philadelphia and Chicago cable markets, respectively. After such purchases, the number of cable providers in Philadelphia and Chicago was substantially reduced. The remaining cable providers were primarily very large cable businesses heavily concentrated in different parts of the country, including Comcast in Philadelphia and AT&T in Chicago.

4. These remaining cable providers then engaged in a series of swaps of cable systems and cable subscribers in their respective monopoly markets, or clusters, to allocate among them customers of cable services and thereby maintain (and increase) their monopoly power in their respective clusters, including Philadelphia and Chicago. These swaps included the allocation of customers between AT&T and Comcast whereby AT&T swapped its Philadelphia area subscribers for Comcast's Chicago area subscribers.

5. Thereafter, as part of a merger between Comcast and AT&T, Comcast acquired AT&T's cable subscribers and monopoly in the Chicago area, furthering the willful acquisition and/or maintenance of monopoly power by Defendants in those markets. As part of the merger, Comcast assumed the liability

of AT&T for its violations of antitrust law, including AT&T's liability for such violations relating to the Chicago area cable market and AT&T's allocation of cable subscribers.

6. Defendants continue to acquire from, and/or swap cable customers with their competitors, again allocating cable customers with their competitors and resulting in the willful acquisition and/or maintenance of monopoly power in the Philadelphia and Chicago clusters. Defendants' past and continuing conduct violates both Sections 1 and 2 of the Sherman Act.

7. Beginning before the Class Period and continuing to the present, Defendants have maintained cable prices at, and further increased prices to, supra-competitive levels in the Philadelphia and Chicago clusters as a direct result of Defendants' antitrust violations.

8. Plaintiffs and members of the Classes seek an injunction, treble damages and other relief against Defendants for their violations of Section 1 of the Sherman Act, including Defendants' imposition of horizontal market restraints by conspiring with and entering into and implementing agreements with competitors to "swap" their respective cable customers (and thus to eliminate themselves as actual and potential competitors and further raise barriers to entry by other potential competitors); and for Defendants' unlawful acquisition or maintenance of monopoly power, or their attempted monopolization of the relevant markets, in Defendants' "clusters" in the Philadelphia, Pennsylvania and Chicago, Illinois areas, in violation of Section 2 of the Sherman Act.

NATURE OF THE ACTION

9. Plaintiffs bring this action against Defendants, the owners and operators of multiple cable television systems, for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

10. Defendants have imposed horizontal market restraints by conspiring with and entering into and implementing agreements with competitors to eliminate actual and potential competition from them and other competitors by exchanging or "swapping" their respective cable television assets, including subscribers. Through the imposition of such horizontal market restraints, Defendants have been able to avoid meaningful competition and Defendants' cable subscribers in the Philadelphia, Pennsylvania and Chicago, Illinois "clusters" have paid higher prices for cable television services than they would have absent Defendants' unlawful conduct. Defendants' conduct in entering into and implementing agreements, allocating markets, territories and customers for cable television services constitutes a *per se* violation of Section 1 of the Sherman Act.

11. Defendants also have engaged in conduct constituting unlawful monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Defendants have willfully acquired or maintained monopoly power in the relevant product market (multichannel video programming services) within the relevant geographic markets (Comcast's Philadelphia and Chicago clusters, as defined below). Defendants' willful acquisition or maintenance of monopoly power is the result of exclusionary, anticompetitive conduct, including without limitation: 1) conspiring with and entering into and

implementing illegal agreements with competitors to allocate territories, markets and customers in connection with the "swapping" of cable television subscribers; 2) acquiring competitor cable companies and their cable subscribers in the Philadelphia and Chicago clusters; 3) Comcast's refusal for years to provide a competitor reasonable, long-term, nondiscriminatory access to essential local sports programming controlled by Comcast and needed by the competitor to compete against Comcast (Comcast has only recently provided a competitor with longer-term access to such sports programming); 4) substantially interfering with a competitor's access to contractors needed by the competitor to build competing cable television facilities and systems; and 5) engaging in anticompetitive targeted pricing and sales practices aimed at areas in which Comcast may face potential competition. Through such unlawful conduct, Defendants have excluded actual and potential competitors from the relevant geographic markets and Plaintiffs and members of the Classes, as a result of Defendants' unlawful conduct, have been forced to pay higher prices for cable television in the relevant geographic markets than they would have paid in the absence of Defendants' unlawful conduct.

12. Though such unlawful conduct, Defendants have attempted to monopolize the relevant geographic markets. Defendants have engaged in such conduct with the specific intent to monopolize and, through such conduct, have demonstrated a dangerous probability of achieving monopoly power in the relevant geographic markets. Defendants' attempt to monopolize the relevant geographic markets also violates Section 2 of the Sherman Act.

PARTIES

PLAINTIFFS

13. Plaintiff Caroline Behrend (formerly Caroline Cutler) resides in Newtown, Pennsylvania During the time period covered by this Complaint, Plaintiff Behrend has been and continues to be a subscriber of non-basic cable programming services provided by Comcast.

14. Plaintiff Stanford Glaberson is an individual who resides in Montgomery County, Pennsylvania. During the time period covered by this Complaint, Plaintiff Glaberson has been and continues to be a subscriber of non-basic cable programming services provided by Comcast.

15. Plaintiff Michael Kellman is an individual who resides in Lake Zurich, Illinois. During the time period covered by this Complaint, Plaintiff Kellman has been a subscriber of non-basic cable programming services provided by Comcast.

16. Plaintiff Lawrence Rudman is an individual who resides in Chicago, Illinois. During the time period covered by this Complaint, Plaintiff Rudman has been and continues to be a subscriber of non-basic cable programming services provided by Comcast.

17. Plaintiff Joan Evanchuk-Kind is an individual who resides in Downers Grove, Illinois. During the time period covered by this Complaint, Plaintiff Evanchuk-Kind has been and continues to be a subscriber of non-basic cable programming services provided by Comcast.

18. Plaintiff Eric Brislawn is an individual who resides in Buffalo Grove, Illinois. During the time

period covered by this Complaint, Plaintiff Brislawn has been a subscriber of non-basic cable programming services provided by Comcast.

DEFENDANTS

19. Defendant Comcast Corporation, formerly known as AT&T Comcast Corporation, is a Pennsylvania corporation with its principal place of business at 1500 Market Street, Philadelphia, Pennsylvania 19102. Comcast Corporation was formed through a merger on November 18, 2002 with AT&T. The merger occurred in several steps. First, AT&T transferred to Comcast Cable Communications Holdings the assets, liabilities and businesses represented by AT&T Broadband Group which was the broadband business of AT&T. Next, AT&T spun-off Comcast Cable Communications Holdings to its shareholders. Then, Comcast Holdings and Comcast Cable Communications Holdings each merged with a different wholly-owned subsidiary of Comcast, and Comcast Holdings and AT&T shareholders received Comcast shares. Through these transactions, Comcast and AT&T combined to form the new Comcast Corporation (formerly AT&T Comcast Corporation). The merger resulted, as a matter of law and pursuant to the merger agreement between AT&T and Comcast, in Comcast's assumption of AT&T's liability for the antitrust violations alleged in this Complaint.

20. Defendant Comcast Holdings Corporation, formerly Comcast Corporation and predecessor to Defendant Comcast Corporation, is a Pennsylvania Corporation with its principal place of business at 1500 Market Street, Philadelphia, Pennsylvania 19102, and is a wholly-owned subsidiary of Comcast.

21. Defendant Comcast Cable Communications Holdings, Inc., formerly AT&T Broadband Corp., is a Delaware Corporation with its principal place of business at 296 North Maple Avenue, Basking Ridge, New Jersey 07920, and is a wholly-owned subsidiary of Comcast.

22. Defendant Comcast Cable Holdings, LLC, formerly known as AT&T Broadband, LLC, is a Delaware limited liability company with its principal place of business at 5619 DTC Parkway, Englewood, Colorado 80001, and is a wholly-owned subsidiary of Com cast Cable Communications Holdings, Inc.

23. Defendant Comcast Cable Communications, Inc. is a Delaware corporation with its principal place of business at 1201 Market Street, Suite 2201, Wilmington, Delaware 19801, is an indirect wholly-owned subsidiary of Comcast.

24. Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications Holdings, Inc., Comcast Cable Communications, Inc., and Comcast Cable Holdings, LLC are collectively included within "Comcast" as used in this Complaint.

25. Before combining, AT&T and Comcast were separate, independent owners and operators of multiple cable systems, operating and competing with one another at the same level of competition in the cable industry. At the time of the transactions described in paragraph 19, Comcast was the third largest multiple system cable operator in the United States, and AT&T was the largest multiple system cable operator in the United States. Upon acquiring AT&T through a merger on November 18, 2002, Comcast became the largest cable company in the

country. Comcast serves over twenty-one million cable subscribers in the United States.

26. During the Class Period, Defendants have provided and continue to provide cable television services in the United States by means of interstate commerce.

27. Defendants' business activities as described in this Complaint were within the flow of and substantially affected interstate trade and commerce.

JURISDICTION AND VENUE

28. Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for injunctive relief, treble damages, and Plaintiffs' costs of this suit, including reasonable attorneys' fees, against Defendants for the injuries sustained by Plaintiffs and other similarly situated Class members by reason of Defendants' violations of Sections 1 and 2 of the Sherman Act.

29. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

30. Venue is proper in this District pursuant to 15 U.S.C. §§ 15, 22, and 26, and 28 U.S.C. § 1391(b) and (c), because Comcast transacts business, maintains offices, or otherwise is found within this District.

CLASS ALLEGATIONS

31. a. As used in this paragraph and Complaint:

(1) "Basic cable services" means the separately available basic tier of video

programming services to which subscription is required for access to other tiers of cable service offered by Defendants and which includes the retransmission of local television broadcast signals and public, educational and governmental access channels.

(2) "Comcast's Philadelphia cluster" means those areas covered by Comcast's cable franchises or any of its subsidiaries or affiliates, located in Philadelphia, Pennsylvania and geographically contiguous areas, or areas in close geographic proximity to Philadelphia, Pennsylvania, which is comprised of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey.

(3) "Comcast's Chicago cluster" means those areas covered by Comcast's cable franchises or any of its subsidiaries or affiliates, located in Chicago, Illinois and geographically contiguous areas, or areas in close geographic proximity to Chicago, Illinois, which is comprised of the areas covered by Comcast's cable franchises or any of its subsidiaries or affiliates, located in the following counties: Cook, DeKalb, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, La Salle, McHenry and Will, Illinois; Jasper, Lake, LaPorte and Porter, Indiana.

b. Plaintiffs bring this class action pursuant to Federal Rules of Civil Procedure 23 (a) and (b)(3) on behalf of the following Classes:

> (1) All cable television customers who subscribe or subscribed at any time since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.
>
> (2) All cable television customers who subscribe or subscribed at any time since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from AT&T and/or Comcast, or any of their subsidiaries or affiliates in Comcast's Chicago cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

32. Plaintiffs do not yet know the exact size of the Classes and such information is in the exclusive control of Defendants. However, based on the nature of the trade and commerce involved, Plaintiffs believe that the total number of members in the Philadelphia Class exceeds two million persons, who are located throughout the Philadelphia, Pennsylvania and surrounding area, and that the total number of members in the Chicago Class is at least 1,700,000 cable subscribers, who are located throughout the Chicago, Illinois and surrounding area. In its 2005 Annual Report, Comcast estimates that the number of cable subscribers in Comcast's Chicago and Philadelphia markets is 1.6 million and

1.8 million, respectively. Consequently, joinder of all members of each Class would be impracticable.

33. Plaintiffs will fairly and adequately protect the interests of all Class members, and have engaged counsel experienced and competent in antitrust and class action litigation. Plaintiffs have no interests antagonistic to those of the other members of the Classes.

34. Plaintiffs' claims are typical of the claims of the respective Classes in that each paid for non-basic or cable programming services and were injured by the same wrongful conduct of Defendants alleged in this Complaint. The violations of the antitrust laws, the effects of such violations and the relief sought are common to Plaintiffs and the members of the Classes.

35. The rights of Plaintiffs and members of the Classes involve common questions of law and fact that would predominate over questions affecting only individual members of the Classes. Whatever difficulties may exist in the management of the Classes are generally outweighed by the advantage of that procedure, including but not limited to providing claimants with a method for redress of claims that might otherwise not warrant individual litigation.

36. The questions of law and fact common within the Classes include, but are not limited to:

a. whether Defendants' conduct in conspiring with and entering into and implementing agreements with competitors allocating markets, territories and customers for cable television services constitutes a *per se* violation of Section 1 of the Sherman Act;

b. whether Defendants' conduct in possessing and willfully acquiring or maintaining monopoly power in, or attempting to monopolize, the relevant markets and engaging in the acts and practices alleged in this Complaint constitutes violations of Section 2 of the Sherman Act, 15 U.S.C. § 2;

c. whether Defendants' acts caused prices for cable television services in the relevant markets to be artificially high and not competitive;

d. whether Plaintiffs and the members of the Classes were injured by Defendants' acts;

e. the measure of damages by which Defendants' conduct injured all members of the Classes; and

f. whether members of the Classes are entitled to injunctive relief as a result of Defendants' continuing conduct.

37. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of this controversy, because it permits a large number of injured persons to prosecute their common claims in a single forum simultaneously, efficiently and without unnecessary duplication of evidence and effort. Class treatment will also permit the adjudication of claims by individual consumer class members, who could not afford to individually litigate antitrust claims against the large corporate defendants. Without class treatment, Plaintiffs and members of the proposed Classes will be unable to vindicate their statutory antitrust claims.

GENERAL ALLEGATIONS
DEREGULATION OF CABLE INDUSTRY

38. In 1992, to protect the public against the increasing market power and dominance of cable operators and promote competition among cable operators, Congress passed the Cable Television Consumer Protection Act of 1992. To further and encourage competition in local markets as a matter of national policy, Congress prohibited local jurisdictions from awarding exclusive franchises for cable systems for a particular geographic area so that cable companies would directly compete against each other. 47 U.S.C. § 541 (a)(1).

39. In 1996, Congress deregulated cable television and passed the Telecommunications Act of 1996, 47 U.S.C. § 251 (the "1996 Act"), to encourage competition, including competition among cable television providers. Through the 1996 Act, Congress sought to "provide for a pro-competitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Cong. Rep. 104-458, 1996 WL 46795, at 1 (1996), U.S. Code Cong. & Admin. News 1996, at 124.

40. Pursuant to the 1996 Act, 47 U.S.C. § 543, the FCC's authority to regulate the rates charged for non-basic, or cable programming services (those channels that are not on a cable system's basic tier and for which there is no per-channel or per-program charge) was terminated for services provided after March 31, 1999. Therefore, the rates charged for such cable services are determined by the cable

companies themselves. Neither the FCC nor any state or local entity has the authority to review rates for such cable services or to investigate allegations that such rates are excessive.

41. Despite passage of the 1992 and 1996 Congressional legislation, large cable companies, including Defendants, have violated federal antitrust law and carved out their own respective areas of operation to the exclusion of competition from other cable companies.

CABLE INDUSTRY: INCREASED CONSOLIDATION, SKYROCKETING PRICES AND LIMITED CONSUMER CHOICES

42. Despite Congress' intention of promoting competition in the cable industry to benefit the public, the cable industry has become increasingly consolidated, consumers' choices among cable operators have been eliminated or substantially narrowed, and in monopoly "clusters" created by large cable companies, including Defendants, cable prices have increased significantly more than in areas where competition exists.

43. In its 2002 report on competition in the cable market, the FCC found that cable companies continue to dominate the market for multichannel video services. As of June 2002, the FCC determined that cable operators provided video programming to more than three quarters (76.5%) of all multichannel video subscribers nationwide. *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Ninth Annual Report,* MB Docket No. 02-145, released December 31, 2002, ("Ninth Video Competition Report") ¶4. As a result of increased consolidation

within the cable industry, as cable operators acquired and traded cable systems and subscribers, the ten largest cable operators serve approximately 85% of all cable subscribers. *Id.* ¶14. In 1995, prior to passage of the Telecommunications Act of 1996, the top ten cable companies served approximately 73.22% of all cable subscribers. *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Second Annual Report,* App. G at Table 2 (1995). In its 2002 report on video competition, the FCC concluded, "The market for the delivery of video programming to households continues to be highly concentrated." *Ninth Video Competition Report* ¶113.

44. The FCC has determined that only approximately 2% of all cable consumers reside in areas with effective competition and only approximately 1.3% of cable consumers are served by an overbuilder (a competing cable system operator).

45. Studies confirm that competition from another cable company is essential to restrain the prices of a dominant cable provider. For example, in its October 2002 report, the United States General Accounting Office (GAO) determined that "the presence of a second cable franchise (known as an overbuilder) does appear to restrain cable prices" and that "in franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider.'" GAO, *Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate: Telecommunications, Issues in Providing Cable and Satellite Television Service (2002) (GAO's 2002 Cable*

Report) at 9. In its October 2003 report, the GAO found that competition from a wire-based cable provider (a competitor using a wire technology, such as a second cable company) is limited to very few (about 2% of) markets; however, in markets where such competition from a second wireline cable company exists, cable rates are significantly lower – by approximately 15% – than cable rates in markets without competition from a second wireline cable operator. GAO, *Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate: Telecommunications; Issues Related to Competition and Subscriber Rates in the Cable Television Industry ("GAO's 2003 Cable Report")* at 3, 9 and 10. In its February 2004 report - involving a study comparing six cities with a second wire-based cable provider (a broadband service provider, or BSP, offering a bundle of cable television, Internet and local telephone services) with six cities without such a second cable competitor - the GAO found that expanded basic cable telephone rates were 15% to 41% lower in 5 of the 6 studied markets with a second cable competitor (BSP) compared to their matched markets without such a competitor. GAO, *Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate: Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets* (2004) at 15. The GAO found that "[t]he ultimate result of the BSP operations, along with incumbent's response, is substantially lower prices for consumers." *Id.* at 12.

46. The FCC has also found that the prices charged by large cable companies are restrained by the presence of an overbuilder in the market. In its 2001 annual report on cable prices, the FCC

determined, solely based on information provided by cable operators that the FCC does not audit, that cable prices on average were 6.3% lower in areas where the incumbent cable operator faced effective competition from overbuilders. *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment* (2001) *("2001 Report on Cable Prices")* ¶8. In its 2002 report on cable prices, the FCC determined, again solely based on information provided by cable operators that is not audited by the FCC, that cable prices were on average 6.4% lower in areas where the incumbent cable operator encounters effective competition from an overbuilder. *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment ("2002 Report on Cable Prices")* ¶28.

47. By contrast, the presence of competition from a direct broadcast system ("DBS") provider does not restrain, or restrains only slightly, the prices of cable services provided by large cable companies. The FCC has determined that in areas where DBS has achieved a degree of market presence, there is no significant effect on prices for cable service. *FCC's 2002 Report on Cable Prices* ¶45. In its October 2002 report, the GAO also found that the presence of DBS companies has not led to lower cable prices. *GAO's 2002 Cable Report* at 9. In its October 2003 report, the GAO determined that DBS competition is associated with only a slight reduction in cable rates. *GAO's 2003 Cable Report* at 11.

48. In its 2004 report on the cable market, the FCC indicated that between year-end 1993 and the end of June 2003, cable prices rose 53.1%, while prices generally, as measured by the Consumer Price Index, increased 25.5%. *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming Services.* Tenth Annual Report (2004) at 56.

DEFENDANTS' MONOPOLY AND ANTICOMPETITIVE PRACTICES

49. Before the Class Period began (December 1, 1999) and continuing thereafter, Comcast and AT&T, including their respective subsidiaries and affiliates, willfully acquired and maintained monopolies and unreasonably restrained trade in the Philadelphia and Chicago clusters, respectively, through a series of acquisitions of competitor cable companies.

50. Defendants further willfully maintained, acquired and exercised monopoly power and unreasonably restrained trade in the Philadelphia and Chicago clusters by engaging in a series of horizontal market allocations in the form of "swap" agreements between Defendants and other cable companies, specifically including swaps between Comcast and AT&T, who were competitors in the Philadelphia and Chicago clusters prior to the market allocating swap agreements between themselves in those markets.

Defendants' Clustering Scheme - Acquisitions

51. Defendants perpetrated their clustering scheme, in part, by acquiring cable systems and cable subscribers from competitor cable companies in Comcast's Philadelphia or Chicago clusters.

52. Examples of Comcast's acquisitions resulting in the addition of cable subscribers in its Philadelphia cluster include:

a. An acquisition of Marcus Cable cable systems which was announced on or about December 5, 1997 and closed on or about April 1, 1998. As a result of this acquisition, Comcast obtained Marcus Cable cable systems and approximately 27,000 cable subscribers in Harrington, Delaware.

b. An acquisition of Greater Philadelphia Cablevision, Inc., a subsidiary of Greater Media, Inc., which was announced on or about February 18, 1999 and closed on or about June 1999. As a result of this acquisition, Comcast obtained Greater Philadelphia Cablevision's cable systems and approximately 79,000 cable subscribers in Philadelphia, Pennsylvania.

c. An acquisition of Lenfest Communications, Inc. ("Lenfest"), including its wholly owned subsidiary, Suburban Cable, which was announced on or about November 16, 1999 and closed on or about January 18, 2000. As a result of this acquisition, Comcast obtained Lenfest Communications' cable systems and cable subscribers in Berks, Bucks, Chester, Delaware and Montgomery counties of Pennsylvania, as well as in New Castle County, Delaware. Through this acquisition, Comcast obtained more than 1.1 million cable subscribers in southeastern and central Pennsylvania, southern New Jersey and northern Delaware. At the time of the acquisition, Lenfest was jointly owned by AT&T and the Lenfest Family. The acquisition agreement between Comcast and Lenfest superseded a prior agreement under which AT&T was to acquire the Lenfest Family's interest in

Lenfest. The acquisition agreement also included a provision allowing AT&T to purchase cable systems serving 1.25 million subscribers from Comcast in the event that AT&T's planned acquisition of Media One Group, Inc., referenced in paragraph 53.c., fell through.

d. An acquisition of Garden State Cablevision L.P. ("Garden State Cable"), in conjunction with Comcast's acquisition of Lenfest Communications, Inc., which was announced on or about November 16, 1999 and closed on or about January 18, 2000. As a result of this acquisition, Comcast obtained Garden State Cable's cable systems and cable subscribers in Atlantic, Burlington, Camden, Cape May, Cumberland, Glouster, Mercer and Salem counties of New Jersey.

53. Examples of acquisitions resulting in the addition of cable subscribers by Comcast and/or AT&T in Comcast's Chicago cluster include the following:

a. An acquisition by AT&T of Tele-Communications, Inc. ("TCI") which was announced on or about June 24, 1998 and closed on or about March 9, 1999. As a result of this acquisition, AT&T gained approximately 1.6 million cable subscribers in and around Chicago, Illinois.

b. An acquisition by Comcast of Prime Communications LLC ("Prime Cable") which was announced on or about December 11, 1998 and closed on or about August 1, 2000. As a result of this acquisition, Comcast obtained Prime Cable's cable systems and approximately 140,000 cable subscribers in and around Chicago, Illinois.

c. An acquisition by AT&T of MediaOne Group, Inc., which was announced on or about May 6, 1999 and closed on or about June 15, 2000. As a result of this acquisition, AT&T obtained MediaOne Group's cable systems and cable subscribers including cable systems and cable subscribers in the Chicago, Illinois area.

Defendants' Clustering Scheme - Swap Agreements

54. Defendants have perpetrated their clustering scheme, in part, by conspiring with and entering into and implementing agreements with competitors to exchange or "swap" cable systems, including cable customers ("swap agreements" or "swaps"). Through these swap agreements, Comcast obtained competitors' cable systems and cable subscribers in Comcast's Philadelphia or Chicago clusters in exchange for Comcast's cable systems and cable subscribers in another part of the country, including swaps between AT&T and Comcast whereby AT&T was given pre-existing Comcast subscribers in the Chicago cluster and Comcast was given preexisting AT&T subscribers in the Philadelphia cluster. The "swaps" and clustering physically removed actual and potential competitors from the Comcast clusters in Philadelphia and Chicago, making the competitors' return to those areas financially unattractive if not wholly uneconomic, and further raised barriers to entry for other competitors.

55. Examples of Comcast's swaps resulting in the addition of cable subscribers in its Philadelphia cluster include:

a. A swap agreement between Comcast and AT&T, which was announced on or about May 4, 1999 and closed on or about December 31, 2000. Through this swap agreement, Comcast obtained AT&T cable systems and approximately 770,000 cable subscribers including subscribers in Eastern Pennsylvania (Bucks and Berks Counties) and New Jersey. In exchange, AT&T received approximately 700,000 Comcast subscribers in Chicago, Illinois, and parts of California, Colorado, Florida, Georgia and Pennsylvania. Comcast and AT&T previously negotiated the swap as part of a settlement allowing AT&T to acquire the large cable company, MediaOne Group, Inc., as referenced in paragraph 53.c., instead of Comcast.

b. A swap agreement between Comcast and Adelphia Communications Corp. ("Adelphia"), which was announced on or about May 26, 1999 and closed on or about January 1, 2001. As a result of this swap agreement, Comcast obtained Adelphia's cable systems and cable subscribers located mainly in the Philadelphia, Pennsylvania and adjacent New Jersey areas. In exchange, Adelphia received Comcast's cable systems and cable subscribers in and around Palm Beach, Florida and Los Angeles, California.

c. A swap agreement between Comcast and AT&T which was announced on or about May 4, 1999 and closed on or about April 30, 2001. Through this exchange, Comcast acquired multiple AT&T cable systems and approximately 595,000 AT&T cable subscribers, including subscribers in Pennsylvania and New Jersey. Upon information and belief, this exchange was related to the swap referenced in paragraph 55.a.

56. Examples of swap agreements entered into by Defendants resulting in the addition of cable subscribers in the Chicago cluster include a swap agreement between Comcast and AT&T which was announced on or about May 4, 1999 and closed on or about December 31, 2000. As a result of this swap agreement, AT&T received approximately 700,000 Comcast cable subscribers, including subscribers in the Chicago, Illinois area. Comcast, in exchange, received approximately 770,000 AT&T cable subscribers, including cable subscribers in the Philadelphia, Pennsylvania area. Through the swap agreement, Comcast transferred its Prime Cable properties, referenced in paragraph 53.b., to AT&T. AT&T engaged in this exchange in an effort to increase its market share in the Chicago cluster and to prevent 21st Century TV Cable, Inc. (purchased by RCN Telecom Services in 2000) from entering the cable services market in the Chicago, Illinois area. Comcast and AT&T previously negotiated the swap as part of a settlement allowing AT&T to acquire the large cable company, MediaOne Group, Inc., as referenced in paragraph 53.c., instead of Comcast.

THE AT&T/COMCAST MERGER

57. On or about December 19, 2001, AT&T and Comcast announced that AT&T's cable business would merge into Comcast. The merger closed on or about November 18, 2002. As a result of the merger, Comcast acquired AT&T's cable systems and more than 13 million AT&T cable subscribers, including the acquisition of AT&T's cable subscribers in the Chicago, Illinois area.

58. The merger between AT&T and Comcast and the creation of Defendant Comcast Corporation resulted, as a matter of law, in Comcast's

assumption of AT&T's liabilities for the antitrust violations alleged in this Complaint.

59. In accordance with the merger, Comcast acquired the assets and agreed to assume the liabilities of AT&T. Specifically, pursuant to the merger, including the Agreement and Plan of Merger dated December 19, 2001 By and Among AT&T Corp., AT&T Broadband Corp., Comcast Corporation, AT&T Broadband Acquisition Corp., Comcast Acquisition Corp. and AT&T Comcast Corporation, implementing the merger, AT&T Comcast Corporation (the parent corporation created under the merger agreement), acquired the assets and assumed the liabilities of the AT&T Broadband Group (AT&T's cable businesses). Pursuant to the merger, AT&T Comcast Corporation became Defendant Comcast Corporation.

60. As a result of the unlawful swap agreements and transactions described in this Complaint, Defendants' actual and potential competitors were removed from the Philadelphia and Chicago clusters and Defendants were able to exclude actual and potential competitors from, and raise prices within, the Philadelphia and Chicago clusters.

61. The purpose and effect of Defendants' conduct in entering into and implementing such unlawful swap agreements and transactions were to unreasonably restrain, suppress and eliminate competition for cable television service in the Philadelphia and Chicago clusters and to maintain the respective pre-existing monopolies of Defendants in those clusters.

62. Defendants' conduct set forth in this Complaint, including the imposition of horizontal territory, market and customer allocations, has had the following effects, among others:

a. Competition, including price competition, for cable television service has been and will continue to be restrained, suppressed, and/or eliminated.

b. Competitors have been, and will continue to be, restrained from entering into the areas subject to the allocation agreements and Defendants' unlawful conduct has raised entry barriers to actual and potential competition, including from overbuilder competitors and from former competitors that ceased or reduced cable operations and sold or abandoned infrastructure necessary to effective competition in the Philadelphia and Chicago clusters.

c. Defendants have increased prices for cable programming services to artificially high, supra-competitive levels and, unless enjoined, will continue to maintain and increase prices at such levels.

d. Cable subscribers have been, and will continue to be, deprived of the benefits of free and open competition, including lower prices for Comcast's cable services in both the Philadelphia and Chicago clusters that would result from effective competition.

e. Prices for Comcast's cable services in the Philadelphia and Chicago clusters would be lower in the absence of Comcast's violations

of the Sherman Act as set forth in this Complaint.

63. In connection with the swap agreements and transactions described in this Complaint, Defendants have not competed in the cable television markets in which they exchanged subscribers in the swap agreements and otherwise acquired subscribers in the transactions, and the other cable operators involved in such swap agreements or transactions have not re-entered or competed against Defendants in their clusters in and around Philadelphia, Pennsylvania and Chicago, Illinois.

64. Defendants' conduct in entering into and implementing the illustrative swap agreements and other transactions identified in this Complaint constitute unlawful horizontal restraints on competition and agreements to divide and allocate markets and to maintain the respective pre-existing monopolies of Defendants in those clusters. Additionally, certain of the swap agreements and transactions referenced in this Complaint contain express covenants not to compete and other provisions restricting the ability of Comcast's competitors to re-enter or otherwise compete with Comcast in Comcast's clusters.

65. Although Comcast and AT&T did, in fact, compete against each other in the Philadelphia and Chicago clusters before the merger of AT&T and Comcast on November 18, 2002, according to their own submissions to the FCC in connection with the merger, Comcast and AT&T represented to the FCC that they did not compete against each other in their respective cable television markets before the companies combined, the companies did not study or evaluate the feasibility of such competition, and the

companies did not intend to compete in each other's cable markets. Defendants' representations to the FCC, while contrary to fact, because they had previously competed in the Philadelphia and Chicago markets, demonstrate that AT&T and Comcast did not intend to compete because they had allocated and divided markets between themselves through market allocating swap agreements, including those set forth in this Complaint.

66. As a result of Defendants' antitrust violations set forth in this Complaint, and beginning prior to and continuing throughout the Class Period, Defendants have maintained prices for non-basic cable services at, and have further increased such prices to, supra-competitive levels in the Philadelphia and Chicago clusters.

67. Plaintiffs and other members of the Classes at all times relevant to this Complaint have been, and continue to be, injured in their property and have suffered, and continue to suffer, damages as a result of Defendants' antitrust violations. Plaintiffs and members of the Classes have paid and continue to pay supra-competitive prices for cable services in Comcast's Philadelphia and Chicago clusters as a result of Defendants' antitrust violations set forth in this Complaint.

68. Defendants' unlawful conduct, including the unlawful swapping and other transactions, set forth in this Complaint constitutes a continuing course of conduct that has harmed and continues to harm Plaintiffs and members of the Classes through Defendants' maintenance of, and further increases to, the supra-competitive rates charged by Defendants for cable services in Comcast's Philadelphia and Chicago clusters.

VIOLATIONS ALLEGED

COUNT I

Violations of Section 1 of the Sherman Act

69. Plaintiffs incorporate all of the above paragraphs as if fully set forth herein.

70. Defendants have conspired and engaged in a strategy of allocating territories, markets and customers among competitors at the same level of the cable television market structure.

71. Defendants have imposed horizontal market restraints, specifically the allocation of territories, markets and customers through agreements to "swap" or exchange cable television assets, including subscribers, with other cable companies. Examples of such swap agreements and transactions are set forth above in paragraphs 55 and 56.

72. Defendants conspired, entered into and implemented such market allocating "swap" agreements for the purpose, and with the effect of, eliminating, suppressing and preventing actual and potential competition for cable television service and unreasonably restraining trade in the Philadelphia and Chicago clusters.

73. Defendants' conduct of imposing horizontal territory, market and customer allocations by conspiring with and entering into and implementing unlawful swap agreements, arrangements or devices constitutes violations, including *per se* violations, of Section 1 of the Sherman Act, 15 U.S.C. § 1.

74. Defendants' conduct, including Defendants' acquisitions of competitor cable companies and their cable subscribers in the Philadelphia and Chicago

clusters, as set forth in this Complaint, constitutes contracts and conduct in restraint of trade in violation of Section 1 of the Sherman Act.

75. As a proximate result of Defendants' restraints on trade and the horizontal territory, market and customer allocations effected through the swap agreements entered into and implemented by Defendants, Plaintiffs and members of each of the Classes have paid more, and will continue to pay more for cable programming services than they would have otherwise paid and, accordingly, have suffered, and will continue to suffer injury and damages in an amount to be determined according to proof at the time of trial.

COUNT II

Monopolization

76. Plaintiffs incorporate all of the above paragraphs as if fully set forth herein.

77. Beginning before and continuing throughout the Class Period, Defendants possessed, and Comcast continues to possess, monopoly power in the relevant product market within each of the relevant geographic markets.

78. The relevant geographic markets are Comcast's Philadelphia cluster, as defined in paragraph 31.a.(2), and Comcast's Chicago cluster, as defined in paragraph 31.a.(3).

79. The relevant product market is defined as multichannel video programming services, which are distributed by multi-channel video programming distributors ("MVPDs"), including cable television operators such as Defendants, overbuilders and direct broadcast satellite operators.

80. Upon information and belief, Comcast controls virtually 100% of cable subscribers within the relevant Philadelphia area geographic market. Upon information and belief, Comcast possesses approximately a 94% share of the relevant product market within the relevant Philadelphia area geographic market.

81. Upon information and belief, Comcast controls virtually 100% of cable subscribers within the relevant Chicago area geographic market. Upon information and belief, Comcast possesses approximately a 92% share of the relevant product market within the relevant Chicago area geographic market.

82. Defendants have willfully obtained or maintained their monopolies through anticompetitive means as set forth in this Complaint.

83. Defendants have imposed unreasonable, horizontal market restraints, specifically the allocation of territories, markets and customers in connection with agreements to "swap" or exchange cable television assets, including subscribers, with other cable companies in order to monopolize the relevant geographic markets. Examples of such "swap" agreements and transactions are set forth above in paragraphs 55 and 56.

84. As a result of such unlawful "swap" agreements and transactions, Defendants' competitors were removed from the relevant geographic markets and Defendants were able to exclude competitors from, and raise prices within, the relevant geographic markets. The purpose and effect of such swap agreements and transactions was to unreasonably restrain, suppress and eliminate

competition for cable television service in the relevant geographic markets.

85. Defendants' conduct of imposing horizontal territory, market and customer allocations by conspiring with and entering into swap agreements, arrangements or devices with other cable companies, which is unlawful as a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and unreasonably restraining trade through the acquisitions of competitor cable companies and their cable subscribers in the Philadelphia and Chicago clusters in further violation of Section 1 of the Sherman Act, constitutes anticompetitive conduct through which, in part, Defendants have willfully acquired or maintained monopoly power in the relevant markets.

86. Comcast has further engaged in conduct excluding or preventing competition, including competition from an overbuilder, RCN Telecom Services, Inc. ("RCN"), a Delaware corporation presently based in Herndon, Virginia.

87. For example, upon information and belief Comcast initially refused to provide to, and then provided only on a short-term basis to RCN, a competitor of Com cast, access to essential video programming, including sports programming, controlled by Comcast and needed by competitors such as RCN in order to gain entry into, and compete against Comcast in the relevant Philadelphia area geographic market.

88. Comcast holds a majority ownership interest (a 78% ownership interest) in "Comcast Sportsnet," a regional sports network which provides professional sports video programming in the Philadelphia area. Comcast owns a majority interest

in two major-league sports franchises, the Philadelphia Flyers National Hockey League franchise and the Philadelphia 76ers National Basketball Association franchise; Philadelphia's two major indoor sports arenas; and several minor league baseball and hockey teams. Comcast's "Comcast Sportsnet" carries a majority of the regular season games of the Philadelphia Flyers and the Philadelphia 76ers', as well as Philadelphia Phillies' baseball games. Upon information and belief, Comcast owns exclusive rights to broadcast games of the Philadelphia Kixx of the national soccer league, and football and basketball games of regional colleges and universities. Comcast distributes its "Comcast Sportsnet" video programming terresterially, thereby allowing Comcast to avoid the program access rules of the Cable Television Consumer Protection and Competition Act of 1992, which were designed to provide competitive access to vertically integrated satellite service programming, and which require vertically integrated cable operators, such as Comcast, to make satellite-delivered cable programming available to rival MVPDs at reasonable and nondiscriminatory terms.

89. "Comcast Sportsnet," which reaches approximately 2.9 million subscribers, offers a significant competitive marketing advantage, access to which is critically important for competitors to be able to compete against Comcast. Access to regional sports programming such as "Comcast Sportsnet" is considered "must have" programming needed by potential competitors to compete effectively. In fact, Comcast in its own promotional material touts the competitive importance of access to "Comcast Sportsnet." For example, Comcast has stated in its promotional materials: "Sportsnet provides a

significant marketing advantage against satellite TV and other competition."

90. Upon information and belief, Comcast initially denied RCN access to "Comcast Sportsnet" programming in Philadelphia. Comcast then provided RCN access to "Comcast Sportsnet" programming only on a short-term basis and refused to provide access to "Comcast Sportsnet" to RCN on a long-term basis. More specifically, Comcast refused to enter into a stable, multi-year contract for local sports programming via "Comcast Sportsnet" in Philadelphia with RCN, but, instead; provided such essential programming to RCN only on the basis of short-term contracts, denying RCN access to a long-term contract that is standard in the industry. After years of attempting to obtain such access, and after the filing of this action, RCN recently obtained a longer-term agreement with Comcast for "Comcast Sportsnet" programming.

91. Upon information and belief, Comcast has also substantially interfered with RCN's access to contractors needed by RCN to build and offer competing cable television services in Comcast's Philadelphia cluster. In order to compete with Comcast, competitor cable companies such as RCN must establish a network capable of providing service to a certain number of homes within specified time periods. Upon information and belief, Comcast has actively sought to prevent and limit competition in its Philadelphia cluster by interfering with the ability of a competitor, RCN, to hire construction and installation contractors and thereby delay or impede RCN's development of its competing network and its ability to connect customers to RCN's cable system in a timely manner. Specifically, Comcast has

prevented, or attempted to prevent, key contractors, comprising a substantial and significant portion of the area contractors in the Philadelphia, Pennsylvania geographic market, from doing business with RCN by entering into or enforcing non-compete clauses in contracts between Comcast (or its predecessor, Suburban Cable) and contractors, by threatening contractors with loss of work from Comcast if the contractors perform work for RCN, and/or by otherwise substantially interfering with access by RCN to needed contractor and construction services in the relevant Philadelphia area geographic market. Through such anticompetitive conduct designed to gain a competitive advantage for Comcast and foreclose competition, Comcast has prevented or attempted to prevent a substantial and significant portion of contractors needed by a competitor to compete with Comcast from doing business with the competitor.

92. Plaintiffs and members of the Philadelphia Class were injured in their business or property by Comcast's anticompetitive conduct set forth in the immediately preceding paragraph in that through such anticompetitive practices that have prevented or constrained effective competition, Comcast has been able to maintain its monopoly power and its supra-competitive prices, and Plaintiffs and members of the Philadelphia Class have been required to pay such supra-competitive prices, for Comcast's cable services.

93. Comcast has engaged in anticompetitive targeted marketing campaigns and price discounts in areas in which an overbuilder has begun providing competitive services. For example, in or about the summer of 2000, RCN entered Delaware County,

Pennsylvania communities served by Comcast, including Folcroft, Pennsylvania. Upon information and belief, in an attempt to prevent or eliminate competition from, and lock out RCN, Comcast, beginning in or around March 2000 and prior to RCN's entry into the market, organized a "Swat Team" of sales representatives and directed sales representatives to sign up Comcast's customers in Folcroft, Pennsylvania, to long-term (eighteen-month) contracts in exchange for lower prices for their cable services. Comcast paid its sales representatives special commissions and bonuses for signing up such customers to the eighteen-month contracts. These contracts provided for a penalty in the event the customer subsequently canceled the contract and switched cable providers. Comcast directed its sales representatives not to inform Comcast customers who were signing up to the eighteen-month contracts of RCN's anticipated entry into the market.

94. Plaintiffs and members of the Classes were injured in their business or property by Comcast's anticompetitive targeted price discounts in areas in which Comcast faced potential competition. As a result of such anticompetitive conduct designed to prevent or destroy competition, Comcast was able to maintain its monopoly power and impose supra-competitive cable prices within its clusters. Plaintiffs and members of the Classes were required to pay such supra-competitive prices and to subsidize, through the payment of such prices, the discounted cable prices Comcast made available only to subscribers offered the anticompetitive, targeted discount rates.

95. In approving the joint applications filed by Comcast Corporation and AT&T for approval to transfer control of certain licenses, the FCC stated that it was not limited by antitrust law principles and applied standards different from those of antitrust enforcement authorities. *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* MB Docket No. 02-70, Memorandum Opinion and Order, released November 14, 2002 at ¶28. Nevertheless, in its Memorandum and Order, the FCC, in its discussion of complaints by certain overbuilders, including RCN, alleging that Comcast engaged in targeted pricing discounts, reported as follows:

> ¶ 120. *Discussion.* Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers. We also disagree with Applicants' claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be procompetitive, targeted pricing discounts by an established incumbent with dominate market power may be used to eliminate nascent competitors and stifle competitive entry.

> ¶ 121 . . . We do not agree with Applicants that targeted pricing enhances competition. To the contrary, targeted pricing may keep pricing artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilders' inability to compete against an incumbent who uses such strategies. Thus, we believe that targeted pricing as described in this record could harm MVPD competition.
>
> . . .
>
> ¶ 122. Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggests, however, that regulatory intervention may be required either at the local, state, or federal level. . . .

Id. at 47-48.

96. Potential cable company competitors, including overbuilders, face significant barriers to entry into the market. These high barriers to entry into the MVPD market faced by potential cable company competitors, include, among other things, overcoming the significant capital costs required for entry or re-entry; obtaining the necessary cable franchises from local governmental authorities; accessing essential video programming, including local sports programming; overcoming the "clustering" scheme engaged in by Defendants and other large cable operators; and overcoming anticompetitive acts and practices of the incumbent monopolist cable company, including Defendants' acts and practices as set forth in this Complaint.

97. Defendants' willful acquisition or maintenance of monopoly power in the relevant markets was the result of the exclusionary, anticompetitive conduct alleged in this Complaint. Such conduct by Defendants includes, among other things, conspiring with and entering into and implementing illegal agreements with other cable companies to allocate territories, markets and customers in connection with the "swapping" of cable television systems and subscribers, in Comcast's Philadelphia and Chicago clusters; unreasonably restraining trade and willfully acquiring or maintaining monopoly power through acquisitions of competitor cable companies and their cable subscribers in the Philadelphia and Chicago clusters; denying or withholding access by RCN, an overbuilder, to essential sports programming, providing such programming only on a short-term basis, contrary to industry standard long-term programming contracts and only recently providing longer-term access to RCN; substantially interfering with RCN's access to contractors needed to build competing cable television facilities and systems in the relevant geographic market; and engaging in targeted anticompetitive pricing and sales practices aimed at areas in which Comcast may face competition from an overbuilder, such as RCN.

98. Comcast has exercised and continues to exercise its monopoly power by raising prices for its cable television subscribers to artificially high, noncompetitive levels within the relevant geographic markets.

99. Defendants' anticompetitive conduct in the relevant markets, as set forth in this Complaint, has had the following effects, among others:

a. Competition, including price competition, for cable programming services has been, and will continue to be restrained, suppressed and/or eliminated.

b. Competitors or potential competitors have been, and will continue to be, restrained from entering into the relevant markets and Defendants' unlawful conduct has raised entry barriers to potential competition, including from overbuilder competitors and from former competitors that ceased or reduced cable operations and sold or abandoned infrastructure necessary to effective competition in the Philadelphia and Chicago clusters.

c. Defendants have maintained and increased prices for cable services at artificially high, supra-competitive levels and, unless enjoined, will continue to maintain and increase prices at such levels.

d. Subscribers to cable services have been, and will continue to be deprived of the benefits of free and open competition, including lower prices for Defendants' cable services in both the Philadelphia and Chicago clusters that would otherwise result from effective competition.

e. Prices for Comcast's cable services in the Philadelphia and Chicago clusters would be lower in the absence of Comcast' s violations of the Sherman Act as set forth in this Complaint.

100. Defendants' willful acquisition or maintenance of monopoly power was not the result of

a superior product, business acumen or historical accident.

101. There is no legitimate procompetitive business justification for the anticompetitive actions and conduct which facilitated Defendants' monopolization of the relevant markets.

102. Defendants' possession and willful acquisition or maintenance of monopoly power in the relevant markets and Defendants' exclusionary, anticompetitive conduct as alleged in this Complaint violate Section 2 of the Sherman Act, 15 U.S.C. § 2.

103. Plaintiffs and members of the Classes were injured in their business or property by Defendants' monopolization of the relevant markets as alleged in this Complaint. Without limiting the generality of the foregoing, Plaintiffs and members of the Classes have been forced to pay higher prices for cable television in the relevant markets than they would have paid in the absence of Defendants' unlawful conduct.

COUNT III

Attempted Monopolization

104. Plaintiffs incorporate all of the above paragraphs as if fully set forth herein.

105. Defendants have engaged in the anticompetitive conduct alleged in this Complaint with the specific intent to monopolize the relevant product market in each of the relevant geographic markets.

106. Defendants' conduct as set forth in this Complaint constitutes and demonstrates a dangerous probability of Defendants achieving monopoly power

in the relevant product market in each of the relevant geographic markets.

107. Defendants' attempt to monopolize the relevant product market in each of the relevant geographic markets constitutes a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

108. Plaintiffs and members of the Classes have been, and continue to be, injured in their business or property by Defendants' attempt to monopolize the relevant markets as alleged in this Complaint. Without limiting the generality of the foregoing, Plaintiffs and members of the Classes have been forced to pay higher prices for cable television services in the relevant markets than they would have paid in the absence of Defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request:

A. That this action may be maintained as a class action under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure and that reasonable notice to the Classes be provided in compliance with Fed. R. Civ. P. 23(c)(2);

B. That the Court adjudge and decree that the horizontal territory, market and customer allocation agreements and other transactions as set forth in this Complaint are unreasonable restraints of trade in violation of Section 1 of the Sherman Act;

C. That the Court adjudge and decree that Defendants' conduct as alleged in this Complaint constitutes unlawful monopolization, or attempted monopolization, in violation of Section 2 of the Sherman Act;

D. That judgment be entered against Comcast and in favor of the Plaintiffs and the members of the Classes for damages as allowed by law, together with costs of suit (including expert costs), and reasonable attorney fees as provided by law;

E. That the judgment so entered include trebling of damages determined to have been sustained by Plaintiffs and the members of the Classes for damages as allowed by law, together with costs of suit (including expert costs), and reasonable attorney fees as provided by law;

F. That Comcast be enjoined from continuing the unlawful monopolization, or attempt to monopolize conduct alleged in this Complaint;

G. That the Court award Plaintiffs and members of the Classes pre-judgment and post-judgment interest as permitted by law; and

H. That the Court award Plaintiffs and members of the Classes such other and further relief as may be necessary and appropriate.

JURY DEMAND

Plaintiffs demand a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

DATED:
May 23,2006 /s/ Anthony J. Bolognese

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW BEHREND, et al.	:	CIVIL ACTION
	:	NO. 03-6604
	:	
v.	:	Philadelphia,
	:	Pennsylvania
COMCAST	:	October 13, 2009
CORPORATION, et al.	:	10:00 o'clock a.m.
	:	

. . . . . .

HEARING
BEFORE THE HONORABLE JOHN R. PADOVA
UNITED STATES DISTRICT COURT JUDGE

* * *

[Page 41]

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Would you state your full name for the record, please?

A James T. McClave.

Q Where do you work, Dr. McClave?

A I work at a firm called Infotech, Incorporated in Gainesville, Florida.

Q And what position do you presently hold at Infotech?

A I'm its president and CEO.

Q Are you one of the founders of Infotech?

A I am.

Q When was Infotech founded, Dr. McClave?

A 1977.

Q What kind of business does Infotech do?

A infotech's primarily in two areas, one being the software, development, maintenance and training, we call it the Systems Division, and the other statistical and econometric consulting which we call the Consulting Division.

Q Let's turn, we're going to spend a lot of time this morning, your time this morning, on the consulting part. But before we do that I'd like to talk a little bit about the other side of the business, what you call the --

A Systems.

Q -- the systems business. Can you describe for the Court a little bit what systems are you talking about?

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A That's really the reason Infotech was founded. We were asked by the Florida Attorney General's Office back in the 70's, when I say "we," my co-founder and I, to determine whether statistical and econometric techniques could be used to ferret out bid-rigging, to put it shortly. In other words, sealed bids were submitted to the Government's agencies for goods and services and Florida Attorney General was using a grant from the Department of Justice to determine whether -- and this was a little bit before PC-- PC's, were there statistical techniques in that regard.

And my co-founder and I basically worked on this for several years, we published a paper or two about

it and then about a year later the AG came back to us and said: well, it's no longer theory, we think we have a problem in the road building area in Florida that there may be rigged bids coming in and we'd like you to come in and apply your techniques.

We did that, we developed some soft-- continued to develop software, they recovered some significant dollars, about $30 million from defendants, and that really established the business because other states began to come to us and say; can you give us the same software that Florida's using to do this kind of thing? And so that's what we've been doing ever since.

Q So is that software that you described in your answer there to I call sniff out bid-rigging, is that still software **[Page 43]** that your company sells and services?

A It is. It's grown a lot from there, we do a lot of construction management for DOT's, Departments of Transportation. So its expanded a lot but at the core of this is still this what we call the collusion detection software.

Q And that collusion detection software itself, does that reflect statistical techniques?

A Yes, that's what's in that software.

Q Approximately how many employees does Infotech have now?

A Today we have about 200 employees.

Q How many of them are involved in that side of the business, that is the software technology side of the business?

A The systems is the predominate side of Infotech, it's about 185 of the 200 employees.

Q What did you do before you founded Infotech, Dr. McClave?

A I was teaching statistics at -- at the university level.

Q At what university? I think we can guess but what university?

A At the University of Florida in Gainesville.

Q Let's turn then now to your educational background. Describe briefly and generally, if you can, to the Court your higher education background?

A I have a Bachelor of Science degree in physics from **[Page 44]** Bucknell University over in Lewisburg, Pennsylvania, and then a Ph.D. in statistics from the University of Florida.

Q Before you left the universities to work full time at Infotech for how long approximately did you teach statistics in universities?

A Approximately 20 years.

Q Which universities did you teach statistics in?

A Upon my graduation, my Ph.D. graduation I came back north to the State University of New York at Buffalo where one of my mentors was teaching, worked under him for a while, and then ultimately the University of Florida hired me back and I went back to Gainesville.

Q When did you go back to Gainesville? In relation to getting your Ph.D. was it five or ten years or just a couple?

A It was just a couple years after my Ph.D.

So most of your teaching experience has been in Florida?

A That's correct.

Q And while you were teaching, Dr. McClave, did you publish articles on statistics in scholarly journals?

A Yes, sir.

Q Statistics journals?

A Yes.

THE COURT: I do have Appendix C to the doctor's corrected declaration which is in the binder marked Tab 1 and I do have in front of me, unless there's some objection, the **[Page 45]** CV that's there.

MR. SHUSTER: No objection, your Honor.

THE COURT: Okay. I do see the extensive list of publications.

MR. GOLDBERG: I'm not going to go -- I'm not going to go through all of those, your Honor. I'm just, I'm going to cover the highlights.

THE COURT: They appear on Page 2 and 3 of the appendix.

MR. GOLDBERG: I'm going to cover the highlights, your Honor.

THE COURT: You may. Go ahead.

BY MR. GOLDBERG:

Q Were those, were any of those articles in peer review journals?

A Most of them are, yes.

Q Would you explain to the Court generally what it means to have an article in a peer review journal?

A Sure. When we submit an article to a peer review journal it goes out to referees, they call them, typically reviewers who decide, A, whether the article ought to be published and, B, if so, whether there ought to be some changes made to it.

Q While you were teaching did you author or co-author any texts on statistics?

A I did.

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Q How many?

A Six in all.

Q Without going into, you know, the particular names or whatever can you describe generally to the Court what areas of statistics those books addressed?

A Sure. The ones that are still currently in use address business, statistics for business and economics. There's a book called Statistics for Engineers and then I've written or co-authored a general text just called Statistics that is in general use, for a general audience.

Q And the audiences for those texts, where are they? Is it high school, is it college, is it graduate school?

A They're all -- all college level, several are graduate level as well.

Q And you testified that earlier in your answer that some of them are still adopted and in use?

A Yes.

Q Which ones are still adopted and in use?

A There are four of them: Statistics for Business and Economics, a first course in statistics for business, Statistics, just the general one, and then a first course in statistics. So there are four that are -- that are still in general use.

Q Are you still a co-author or a lead author on any of those books?

[Page 47]

A I am the lead author on all of them, I believe, yes.

Q And you still work on those books?

A I do.

Q In approximately how many states presently -- let me back off a little bit. How long has it been since you have been teaching full time in universities?

A Almost 20 years. I last taught full time in 1990.

Q Okay, presently, today, in about how many states in this country, are your books adopted by colleges and universities for teaching statistics?

A Well, I don't know in the 2009 school year yet. We haven't seen the adoption list. But in 2008 and '09, last school year, it was about 35 states that the books had been adopted in by at least one college.

Q I asked you to check about this in preparation for your testimony, is that correct, Dr. McClave?

A You did, sir.

Q All right. And in those 35 states, in approximately how many institutions of higher education, colleges and universities are you texts adopted and used by students to learn statistics?

A I counted about 130 colleges and universities.

Q Let's just, we're here in Pennsylvania, Dr. McClave, are you books adopted and used in colleges and universities here in this state, the Commonwealth of Pennsylvania?

[Page 48]

A Yes.

Q Which ones?

A Which book or which college?

Q I'm sorry, which book -- which colleges?

A The Statistics for Business and Economics, last year was used at Bloomsburg University, Bucknell University, my alma mater, I was glad to see that. California University of Pennsylvania. Carnegie Mellon, Delaware Valley College, Drexel University, Gettysburg College, LaSalle University, University of Pittsburgh, University of the Sciences here in Philadelphia and the University of Pennsylvania, here in Philadelphia.

Q Have you kept, in addition to writing, authoring or co-authoring these books, have you kept any other connection to your prior academic life presently?

A Sure, I still live in Gainesville, so I keep an active tie at the University of Florida. I'm an adjunct professor there. Which means I serve on some com-

mittees, I teach from time to time for colleagues, when they need a guest lecturer for one reason or another. So, yes, I do keep my ties.

Q In addition to your continued work at the University of Florida, in statistics, do you have any other ties to academic institutions presently?

A Yes, for the past five years, I've been a guest lecturer at the law school here at the University of Pennsylvania in **[Page 49]** the area of use of statistics and econometrics in antitrust matters.

Q And does that --

A It's to an antitrust class.

Q And is that continuing?

A Yes, I did it last fall and expect to do it again this fall.

Q All right, I want to turn now from your academic experience to your consulting experience, Dr. McClave and again, I'm not, your Honor, going to go through all of the many, many consultancies that are listed in Dr. McClave's resume. But instead, I'm going to just talk generally about them. For approximately how long have you done -- I'm going to call it litigation consulting, but consulting in lawsuits or other types of contested legal proceedings?

A It dates back to my work with the Florida Attorney General in the late '70s, which would be about 30 years ago.

Q Taking that whole period of time, 30 years of consulting that you have done, in approximately how many cases and by cases, I mean in court or in some contested proceeding. In how many cases have you offered your expert opinions?

A Approximately 250 cases.

Q Now, of those 250 cases, Dr. McClave, in how many of those instances did you offer your expert opinions for purposes of estimating damages?

[Page 50]

A Approximately 150 of those were damages cases.

Q All right, now, let's take that universe or subset. Of those 150 or so cases in which you have offered opinions estimating damages, how many of those were damages arising from antitrust claims?

A Approximately 50 of those were antitrust cases.

Q Now, going back to the estimating damages generally, what kind of -- did you employ statistical techniques to estimate damages?

A Yes.

Q In all of those cases?

A Yes, I'm a statistician.

Q And then the answer would be the same for every one of the antitrust damage cases, the 50 or so that you have estimated damages, you used statistical techniques?

A That's correct.

Q In your consulting experience, Dr. McClave, do you always work for plaintiffs?

A No.

Q Do you work for defendants?

A I have, yes.

Q Have you ever been engaged by government agencies to consult with them on litigation matters?

A Yes, sir, I have.

Q Just a few times or many times?

[Page 51]

A Numerous times since the very first one in late-1970s.

Q How about right now, are you engaged to, as a consultant, to government agencies? A Yes, sir.

Q How about the Federal Government, have you ever been engaged by Federal Government agencies to consult with them?

A Yes, I was counting that in my previous answer and the answer is yes.

Q I want to get a term down, just for the record, I'm sure the Court is familiar with the term, but you've used it and we're going to use it, econometrics. We've talked about statistics. Will you define for the Court, what econometrics is?

A It's the application of the science of statistics to business and economic issues.

Q In the antitrust cases that you have consulted on, where you have estimated damages, can you describe generally for the Court, what kind of statistical techniques you employ to estimate damages in those antitrust cases? I want to separate out from this one, right now.

A Sure. Well, in every case that I can remember working on, the object is to estimate a but-for or a competitive price, assuming that the plaintiff will prevail on liability issues of antitrust. And in estimating that but-for price or that competitive price,

it's my experience that one almost -- **[Page 52]** I, certainly, almost always use multiple regression analysis in some form or another. And I've certainly evaluated and seen a lot of other experts in this same arena and doing these same tasks. And by far and away, multiple regression analysis is the most often used tool.

Q Did you use multiple regression analysis to estimate damages in this case?

A I did.

Q The same general type of statistical technique that you used in the other 50 cases?

A That's correct.

Q Last week, when the lawyers met with the Judge, in preparation, the Judge asked a question about what is multiple regression analysis. You write the textbooks on multiple regression analysis. Can you explain to the Court, again, briefly and generally, what multiple regression analysis is?

A Sure, regression analysis dates back to the mid-1800s. I think the first papers were around 1860. A man named Sir Francis Gaulton (ph), who was what I think of as an eclectic scientist. He dabbled in a lot of scientific areas, not really a specialist. He was really the person that developed the idea of correlating, in a formal way, one variable with another. And the first thing he worked on, actually, was estimating or predicting what the height of a son would be **[Page 53]**based on the height of the father. So, the concept was to develop a model that would estimate or predict the height of the son based on the height of the father. And what he discovered was, there was a tendency to, what he called, regress to the mean and that's where the regression term

comes from. And what that means is taller fathers will tend to have taller than average sons, but on average, not as tall as they are, they'll regress to the mean. And shorter than average fathers will have shorter than average sons, but not as short as they are. My son proves that, actually, for me. He's three or four inches taller than I am.

So, the whole idea of regression to the mean was established and obviously, that was a very simple application, but it has grown considerably, needless to say, from there to a point where now it's a procedure used in basically all sciences, to relate one variable of interest, like the son's height, to now, usually, multiple variables of interest. In other words, now it might be both the father's height and the mother's height and some other variables. So, multiple regression means relating a single variable, on the one hand, the son's height, to a number of variables that might help predict that.

Q Is multiple regression analysis or modeling, those are essentially the same terms?

A Well, yes, multiple regression modeling, multiple **[Page 54]** regression analysis, I think of those as the same.

Q Is multiple regression modeling generally recognized as and within the discipline of statistics and econometrics as an appropriate tool for estimating damages in cases like this?

A It certainly is. It's been used, personally, by me many times and I've seen it used numerous times by others, as well.

Q How about in the literature itself, in the statistics and econometrics literature?

A Sure, it's widespread.

Q Are there books written for federal judges describing scientific evidence that approved the use of multiple regression modeling for estimating damages?

MR. KORPUS: Objection, your Honor, it's getting a little leading now to the inquiry.

MR. GOLDBERG: A little, it's a little leading, your Honor.

THE COURT: I'll overrule it, it is leading.

MR. GOLDBERG: I'm trying to move it along, your Honor.

THE WITNESS: Sure, the reference manual, for example, on scientific evidence, published by the Federal Judicial Center, has a full section on multiple regression analysis.

[Page 55]

BY MR. GOLDBERG:

Q Do you consider yourself as having expertise in the discipline of statistics, Dr. McClave?

A Yes.

Q That is both as to theoretical statistics and applied statistics?

A Yes.

Q Will you explain to the Court the difference between theoretical statistics and applied statistics?

A Well, theoretical statistics has its basis in mathematics, really. And so, theoretical statistics is the part of statistics that establishes the basis for, for example, multiple regression analysis. I mean,

there's a lot of mathematics behind it. So, when I enrolled at the University of Florida, in the graduate program, the first two years or so were almost pure math. We didn't see many numbers. And then, once the theory is established and you've got the basis in that and passed some tests in it and so forth, you begin to apply it in various areas, like economics, which is what econometricians do. So, that's basically the difference.

Q Do you consider yourself as having expertise in the discipline of econometrics, as you've described it to the Court --

A Yes.

[Page 56]

Q --Dr. McClave?

A Yes, I'm sorry. Yes, that's the area in which I have worked most of my career.

Q I'm going to get to what you've done in this case, Dr. McClave and some of the detail that you and I have discussed before. But you were in the court, were you not, during Mr. Shuster's opening statement?

A I was.

Q So, I'm going to spring a surprise and I want to ask you some questions. You heard Mr. Shuster said about you and your work and your models?

A I did.

Q I want to ask you some questions about that and then we'll go -- just to get your immediate response to it and then we will cover those things in your testimony.

THE COURT: Are you ready to offer him as an expert now or do you want to wait until --

MR. GOLDBERG: Oh, sure, your Honor, I'm sorry.

THE COURT: Any questions with respect to Dr. McClave's expertise?

MR. KORPUS: No.

THE COURT: And he's being offered as an expert in econometrics, especially methodologies in calculations pertaining to economic damages caused by anti-competitive behavior, is that what you're offering him for?

[Page 57]

MR. GOLDBERG: That's excellent, your Honor.

MR. KORPUS: No objection for this hearing, your Honor.

THE COURT: We certainly do receive him as an expert in that regard. You may proceed.

BY MR. GOLDBERG:

Q In his opening statement, Mr. Shuster told the Judge that you only, your model only controls for median household income and number of channels, do you remember Mr. Shuster saying that?

A I do.

Q You heard that?

A Yes.

Q Is that correct, Dr. McClave?

A No, it's not.

Q Does your model control for more than just number of channels and median household income?

A It does.

Q Mr. Shuster said to -- we will cover this later on -- Mr. Shuster said that in your deposition, you were deposed by Mr. Korpus in this case?

A I was.

Q You remember that?

A I do.

Q Mr. Shuster said that you admitted, he used the word **[Page 58]** admitted. You admitted trying to control for population density, but you found that it had too great an impact on the damages and so, you dropped it. Do you remember Mr. Shuster saying that to the Judge?

A I do.

Q Is that true, Dr. McClave?

A No, sir, that's not true.

Q Did you, first of all, when methodologists, statistical methodologists specify their model, they're looking to determine what variables to try to control for, right?

A Yes, the whole concept of multiple regression is what variables should be in the model as to explain the variable interest, in this case, price.

Q And did you look at the issue of population density as a possible variable?

A I would say a population density has been probably the most discussed variable between experts in this case, that there s. I certainly did look at it.

Q Did you determine that it should not be used?

A I did.

Q Why did you determine it should not be used?

A There were basically three reasons. The first several are purely statistical. When population density, when I put it into the model to see whether it was important or not, I had an a priori (ph) understanding that from, for example, **[Page 59]** Comcast's submissions to the FCC, that in places where there were lots of people, efficiencies should exist and costs should be less than where there are few people. And so, my a priori expectation, which econometricians have when they're putting models together, was that the relationship between population density and price would be inverse, a negative one. That is, as population density went up, costs would go down and so price would go down.

Q Let me stop you for a second.

A Sure.

Q You talk about having an a priori intuition and expectation. Is that unusual for statisticians, econometricians to approach specifying a model with a priori expectations?

A No, it's not unusual at all. In fact, there are econometrics texts that say that it's something akin to moral obligation for an econometrician to establish such hypotheses and expectations. And then, if the data don't live up to that, to try to understand why.

Q So, now, I interrupted you and I'm sorry, Dr. McClave. Please go on and explain to the Judge why you didn't include the population density?

A When I added population density to the model, it had the opposite sign, it had a positive sign, indicating that prices were going up as population density increased. The concern I **[Page 60]** had, when I saw that, was number one, it didn't conform to what I expected. And number two, I was concerned that one of the reasons that that might have been the case was the challenged behavior in this case. In other words, the cluster. And so, the concern I had about leaving population density in the model is, number one, it didn't conform to economic expectation. And number two, it may be tainted by the very behavior that I am assuming was illegal for the purpose of my analysis, was anti-competitive. And then finally, the last reason, your Honor, was the benchmark and we're going to get into this, I know. But the benchmark that I was using in order to estimate prices into Philadelphia, turned out not to have -- turned out that the population density in Philadelphia was somewhat greater than that in most of the benchmark. And so, we call that needing to extrapolate in statistics and it's something we try to avoid.

And so, I preferred the median income variable, because median income was a variable that captured all of Philadelphia, that is my benchmark median incomes range captured all the median income for the counties in this area and Philadelphia. And it had the expected sign. Namely, as median income went up, it had a positive relationship with price. Which again, from my reading and my own expectations of the work in this industry, median income, higher median income probably is correlated or a proxy for more demand for **[Page 61]** cable. And also, higher median income probably means that the

cable companies are having to pay more for their labor.

So, there are several reasons why median income, to me, made much more sense than population density and that's why it ended up in my model and population density didn't. It had nothing to do, Mr. Goldberg, with whether the damages were higher or lower.

Q You anticipated the question, Dr. McClave and we will get back to this. I want to reference one other thing that Mr. Shuster said in his opening statement about your model here. And Mr. Shuster said to the Judge, what Dr. McClave is saying -- he means your model -- is that the model assures, assumes that Comcast, your model assumes that Comcast in a competitive or more competitive world, Comcast share would go below 40 percent in the Philadelphia area. Did you here Mr. Shuster say that?

A I did, I did hear that.

Q Is that correct, Dr. McClave?

A No, that's not a correct characterization of the model.

Q As you specified your model here -- let me withdraw that. There's not one way to specify a multiple regression model, is there?

A There certainly isn't.

Q And there are various types of multiple regression models, aren't there?

[Page 62]

A That's also true.

Q And we're going to talk about the particular way you specified your model here, but in the way that you specified your model here, does your model require an assumption about what Comcast's share in the Philadelphia market would be in a but-for world?

A It does not.

Q And was that a conscious decision on your part in specifying your model?

A Yes, it was.

Q All right, thanks. And there are other things and in the course of your testimony here, I'm going to ask you about other things that Dr. Chipte and the defense lawyers say about you and your model. But I want to now turn back to how you and I discussed getting this out for Judge Padova.

I want to turn to what you did in this case, Dr. McClave. Can you describe for the Court generally, what you did to come up with the multiple regression model you used to estimate damages in this case?

A Sure, I began as I do in any new case or new investigation, by learning as much as I could about what it was plaintiff's were alleging. What it was, what the behavior was, what the alleged affects of the behavior was, so, that's where I began.

Also, as in any new case, it typically will involve [**Page 63**] an industry with which I may not be all that familiar and so, my staff and I spend a lot of time trying to learn more and more about the industry. And this is an industry about which much has been published, so that was an arduous task, but one that, at least, had plenty of resource associated with

it. And then finally, being an empiricist, a statistician, we got around to trying to understand the data. Trying to collect, understand and put the data in form that we could analyze it and think about how it was we were going to go about accomplishing our task, which had been assigned to us, which was, again, to estimate economic damages, assuming that the trier of fact would decide that the anti-competitive behavior was, in fact, illegal. So, those were generally the large tasks that we undertook.

Q Did you, in your specification of the model and in your work in this case, assume that plaintiffs would be able to prove the anti-competitive conduct that they alleged in this case?

A I did.

Q Is that something that statisticians and econometricians routinely do in this type of endeavor of estimating damages in an antitrust case?

A It certainly is. As I understand the concept behind estimating economic damages is one assumes liability because if liability isn't proved, the damages are irrelevant.

[Page 64]

Q Did you hear Mr. Shuster tell the Judge that you also assumed impact?

A I did hear that, yes.

Q Is that correct, Dr. McClave, did you assume impact?

A No, I did not. I was testing whether there was impact.

Q Isn't that what, in fact, the multiple regression model does, in part?

A In part, that's what the analysis does, yes.

Q So, after you have done the investigation that you described, understanding what the plaintiff's claims were, recognizing that you have to assume that they'll be able to prove the conduct, investigating the industry, identifying and looking at the data. Then what do you do for the purposes of then coming up with a multiple regression model, deciding what kind you want to do, specifying the model. Can you describe that again, generally, to the Court?

A Sure, well, the first step, in my experience in antitrust cases is if plaintiffs are correct and anticompetitive conduct is present in Philadelphia, then we need to look outside Philadelphia for a benchmark or a yardstick or a set of markets against which we can compare Philadelphia. And the benchmark markets need to be relatively free of the affects that plaintiffs complain of in Philadelphia.

So, the first step is to look for such a benchmark. Once that benchmark has been found or established, then comes **[Page 65]** the multiple regression part. And that means, within the benchmark, we want to find out what it is that legitimately and I use that word advisedly, it legitimately affects price. What are the factors of supply and demand that affect price, that are not related to the challenged conduct. So, that's step two, the multiple regression specification is what it's called.

Once the model has been specified, the third step is to use it to estimate the but-for prices or competitive prices in Philadelphia. And this goes to your last question, Mr. Goldberg, there's no assumption that those prices, when they're estimated, will be lower, equal to or higher than those in Philadelphia. I mean, that's what's being tested here. But, at any

rate, the third step is to go ahead and estimate those prices and then to look at the differences, to see whether or not the actual prices in Philadelphia differ from the competitive or the but-for prices. And to the extent they do, to the extent they're higher, then it becomes a matter of arithmetic to do the multiplication to figure out how much higher and how much economic damage or impact, if any, exists in the market. So, those are the basic steps.

Q In response to one of my earlier questions, you said there were different types of multiple regression models?

A Yes.

Q And is it correct, Dr. McClave, that there are different **[Page 66]** types that you might have been able to employ in this case, is that correct?

A Yes, that's right.

Q What type of multiple regression model did you choose to employ in this case?

A It's known -- it falls into the category called reduced form multiple regression model estimated by ordinary least squares. A long phrase.

A There's a little jargon here, which I am going to ask you to talk about, but is it all right with you, if for the purposes of the questioning, I refer to it as an ordinary least square's reduced form model?

A Sure, that's fine.

Q Let's talk about the reduced form part of it, first. Can you explain to the Judge here, what is a reduced form multiple regression model?

A All right, so, in general terms, there are two types or two categories of models. One, we call struc-

tural models, which attempt to go deep into the supply and demand and price relationships and actually explain, using models, the full structure of the industry. Those models involve typically a number of stages and a number of multiple models.

Reduced form models, which are much more common, attempt to take the structural models and reduce them, as the name implies, to a single model. To a model that captures **[Page 67]** the essence of the structure of the industry, but may use, for example, proxies for measures of costs in supply and demand. And so, reduced from models are the latter type of models and those are the models that are, by far and away, structural models are on the relatively rare side, because of the extreme difficulty in capturing the amount of data you need and so forth and having the time to do it, as well, versus reduced form models, which are by far, in science in general and in econometrics in particular, are much more common.

Q You talked about having the time to do it. Let's just talk again, generally and we won't bore the Court with how expensive this is, but approximately, how much time that you and the staff at Infotech have been working, not hours, but just over the period of time that you've been involved in this? What period of time are we talking about?

A Our involvement has been intense from, at least, last fall. So, at least, a year's worth of very intense work and probably, I'm not remembering further back than that, just because I'm not.

Q And that's working on a reduced form model?

A Yes, well, it's working on a lot more than a reduced form model, it's working on the data and

understanding the case and so on. But certainly, from the beginning, yes, we were, we knew we were going to end up with a reduced from model.

[Page 68]

THE COURT: Theoretically, what does the structured model give you that the reduced form model does not give you? Or vice versa?

THE WITNESS: Probably a deeper understanding of the industry itself. You know, exactly what it is that's causing demand and what controls supply and so on.

THE COURT: It affects the reliability of the results, in that, reduced form model are less reliable than structural models?

THE WITNESS: That is typically, your Honor, not an accepted -- it is not accepted. It's true that one for -- I'll give you an example. I gave you an example before that median income is probably a proxy for demand and maybe cost in the cable industry. But certainly, it's not -- there's not someone at cable headquarters that thinks about median income and says, you know what, I think we should raise our price. It's a proxy for demand. So, it doesn't mean that the model for price will be any less reliable. What it does mean is you may not understand all the nuances of supply and demand that affect price. So, again, it's structural models are typically postulated when one is going to study an industry for maybe a decade and try to deeply understand what it is that's driving it.

THE COURT: Well, one of the objectives of your work with respect to these models, was to determine, A, whether **[Page 69]** there was any impact from the conduct that plaintiff complained about and the

amount of damages that resulted from that. But let's take any person, whether or not there was an impact from the precise conduct that the plaintiff has complained about.

THE WITNESS: Okay.

THE COURT: And let's look at the difference between a reduced form model and the structured model with respect to that objective.

THE WITNESS: Okay.

THE COURT: And tell me we classify or characterize the difference between the two.

THE WITNESS: Typically, a structural model would not be postulated to do that -- to accomplish that task.

THE COURT: Why not, if it's more complete?

THE WITNESS: Well, because it's not the concept of studying an -- well, for example, a structural model might build in the very things that are being complained about in this case, because the structural model might say, those swaps and acquisitions, for example, that are being complained about, are a structural part of what has created the market, say, here in Philadelphia.

THE COURT: So, then the structural model may not be as reliable?

THE WITNESS: Absolutely, right. Especially, if **[Page 70]** you're trying -- especially, if it becomes tainted by or affected by the beginning --

THE COURT: I'm talking about the objective, the objective that we're --

THE WITNESS: That's right, yes.

THE COURT: Okay.

THE WITNESS: Of measuring impact.

THE COURT: So, the structural model may not be as reliable?

THE WITNESS: Yes. And that's probably, your Honor, why I've never seen one used in an antitrust case.

THE COURT: And why is that? It's because the results that it reports may include precisely the specific factors or may mix those factors?

THE WITNESS: It certainly could, yes. It probably would if you were trying to describe, say, the national cable market, where there's a lot of clustering, for example.

THE COURT: Sorry, go ahead.

MR. GOLDBERG: No, that's -- I actually was going to ask it in a slightly different way and so I may be covering some ground that your Honor covered and I apologize in advance.

BY MR. GOLDBERG:

Q But if one were to do a structural model, would you expect to be able to do that in a year or even two years?

[Page 71]

A No, I certainly wouldn't.

Q And as you, again, so we have a clearer record, within the discipline of statistics and econometrics, are structural models viewed as more reliable than reduced form models for the purposes of estimating impact and damages?

A No, they are not.

MR. KORPUS: Objection to the form, your Honor. mean, I object, how does he know what people in the industry know --

MR. GOLDBERG: No, I didn't ask about the --

THE COURT: I'm going to overrule the objection and if you don't know.

MR. GOLDBERG: I also didn't ask about the industry. I asked about econometricians or statisticians. That's what Dr. McClave is an expert on.

THE WITNESS: No, I would not say you can make a general statement one way or the other about which way is more reliable. I think it's going to depend on the application.

BY MR. GOLDBERG:

Q Now, let's turn to the other half of the description of **[Page 73]** your model. That is, you said it was a reduced form multiple regression model estimated by ordinary least squares. This is getting into the black box for me. Can you describe to the Judge, generally and briefly, what is meant by ordinary least squares estimation?

A Well, ordinarily least squares, your Honor, simply is the mathematical method that's used to estimate the model. The model, we keep saying model. A model is just an equation. It's the price on the one side, we call it the dependent variable with an equal sign and then, a number of factors on the other side, that have weight assigned to them. And those weights are often called co-efficients, they're estimated by data. And the way they're estimated most typically, is called least squares or ordinary least squares. And the idea is you've got this set of data,

Q You don't write that in your books, do you?

A No, I've never written that in any form.

Q Let's turn to, oh, one other thing before I get to ordinary least squares. The reduced form was easier, but before I turn to ordinary least squares, you, in one of your answers to Judge Padova, you talked about using a proxy for supply or a proxy for demand and that is in contrasting a reduced form model for a -- with a structural model. Do you recollect that?

A I do, yes.

Q Explain to the Judge what you mean or what, generally, econometricians mean when they talk about using a proxy for something like supply or something like demand?

A Sure, so, often we can't directly measure what actually supply is or what actually demand is. I mean, those things, in many cases, the data simply aren't available or it's more difficult to define than one can get his arms around. And so, it's much more common to look for variables or factors that are correlated with or proxies for things like supply **[Page 72]** and demand. And cost is a good example, I mean, we were not privy to, in this case, for example, Comcast's, you know, complete cost of operation and so forth. We had some general ideas, but in terms of getting behind it and you know, getting into depth on what their actual costs were in every location and so forth, that just wasn't feasible. And so, we were looking for things that might proxy for cost.

Q Again, among statisticians and econometricians, is it generally accepted that proxies are less reliable than direct observations?

usually massive and you're taking price against a number of factors.

And the idea is to get the best fit, the model or the equation that gives you the best explanation of price. And once you've got the data and once you've made your specification, it's a matter for computers. Again, it gets back to theory of statistics. It's a mathematical method that provides that best fit. And ordinary least squares has been around probably for a century, as the most widely accepted method of fitting models, of estimating models.

Q All right. It's the computer that actually does this **[Page 74]** ordinary least squares estimation?

A Thank goodness. When I was a graduate student, we did it by hand and it wasn't any fun. Now, it's computers.

Q And there are software programs that run off your computer with, that will do that?

A Exactly.

Q Thank you. I want to turn now to what you described to his Honor as your -- your first essential step in the specification of the model and that is, the selection of the benchmark. How did you go about to determine what would be the benchmark areas?

A Well, as I explained to your Honor earlier, I was looking for markets or areas that were relatively free of the affects of what I understood to be the challenged behavior in this case. And as I understood it, there were sort of two aspects to that, two essential aspects. One was that the behavior had the affect of constraining DBS or satellite penetration in Philadelphia, that it had held it at very low levels. And

secondly, that the challenged behavior had led to a significant cluster market power on the part of the defendant, Comcast, in this market.

So, I was looking for markets that didn't look like that. In other words, I was looking for markets in which DBS penetration was relatively high and in which Comcast's share of the market was relatively low. As proxies for areas in **[Page 75]** which there might be, if plaintiffs are right, relatively more competition than there is in Philadelphia.

Q If somebody criticized your benchmark areas because those benchmark areas did not look like Philadelphia with respect to the salient characteristics. Would that you be a fair criticism?

A Well, certainly not if the criticism is tied to the anticompetitive behavior. For example, if someone complains that my benchmark had high DBS penetration, my answer is its supposed to. Because if plaintiffs are right, the challenged behavior has constrained DBS penetration here. So, my first reaction is the benchmark is not supposed to look like Philadelphia in several important ways.

Q Dr. Chipty and Comcast's lawyers in this case, criticize your selection of the benchmark counties, calling them and I'm quoting, "hand-picked", calling them alternatively, "cherry-picked" and asserting that your benchmark counties are poor and rural and hence, different from Philadelphia. Do you remember those criticisms?

A I remember them.

Q You've read Dr. Chipty's reports, the many of reports?

A I certainly have.

Q And you read the briefs filed by Comcast's lawyers in this case?

A I did.

[Page 76]

Q What's your response to that criticism, Dr. McClave?

A That they're wrong on all counts.

Q Explain that to his Honor.

A Well, first of all, I didn't handpick these places. I set out to find places that had relatively high DBS penetration and relatively low Comcast market share. I set objective criteria. Basically, I said with respect to DBS, I'm going to look at places that are above the national median or average, is the way I measured it, was the median. And I'm going to look for places in which Comcast's market share is below, actually, a number that's slightly above their national average, but below 40 percent. Their national average is in the 30 to 40 percent range. So, I set filters or screens, as I always do, based on statistical criteria. Not some sort of, whatever they call it, handpicked or cherry picked.

THE COURT: Well, the benchmark was to be an environment that didn't reflect in any way, shape or form, what you were told was the antitrust impact.

THE WITNESS: Precisely, your Honor.

THE COURT: Is that correct?

THE WITNESS: That's exactly what I was trying to do.

Q And you used objective criteria?

A I did.

[Page 77]

Q You didn't have any particular counties in mind that you wanted to have in or have out?

A No, I just knew I wanted a fair number of counties. Sample size matters, your Honor, in terms of reliability of the models. I couldn't go out, in my opinion, and pick five or six counties or places and say, that's enough. I was looking for hundreds, if I could get them. And so, that's why I used average. I figured if I used median or average, you know, roughly 50 percent on the DBS scale and roughly 50 percent or a little more on the market share.

THE COURT: Where did you look, territorially, geographically, where did you look?

THE WITNESS: Everywhere Comcast had a footprint. So, nationally, where Comcast had a footprint.

Q You didn't exclude anyplace, a priori?

A None whatsoever, no.

Q And that you let the -- did you let the objective criteria then select the counties?

A I did.

Q All right, but you said on all counts, so, let's go on beyond just the cherry-picking accusation.

A Well, in the brief and I think, in Dr. Chipty's last report, they list a set of counties that happen to be in that benchmark, which are relatively rural. I think Mr. Shuster talked about the places in the Rockies.

[Page 78]

Q That's where I'm from.

A That's all right. And so, I, again, I had just used this objective criteria in looking for, as your Honor put it, places that were free of the behavior here. But, I began to wonder, well, are they all rural according to if you read the brief, it sounded like the whole place, every place I looked at was rural. So, I went back and looked at the benchmark to see if that were true.

Q Let me stop you for a second, your Honor. Dr. McClave, did you prepare -- you and the people who work with you -- did you prepare certain demonstratives to help you explain your testimony to Judge Padova?

A I did.

Q We have some demonstratives, your Honor. Is it all right when we -- we put up the demonstratives, that I ask the witness to come down from the stand?

THE COURT: Sure, absolutely.

MR. GOLDBERG: Can I have some exhibit stickers, please?

THE COURT: Sure.

MR. GOLDBERG: We're a well-oiled machine here, your Honor, as you can see.

(Pause.)

MR. GOLDBERG: I believe, your Honor, your 8 and a half by 11's have the exhibit numbers on them. But I want to **[Page 79]** put the exhibit numbers on the demonstratives also.

(Pause.)

Q Could you come down from the stand. I'm going to try and get the --

THE COURT: Is the form where you gave me --

MR. GOLDBERG: Your Honor, I can try and get it so you can see it or you can come around.

THE COURT: It's on the screen. Mr. Goldberg, the folder that you gave me with the plaintiff's exhibits, are these the McClave exhibits that will be used during this witness' testimony?

MR. GOLDBERG: Yes.

THE COURT: Just this witness?

MR. GOLDBERG: Yes, just this witness.

THE COURT: Okay.

MR. GOLDBERG: The first one is -- come on down.

THE COURT: Plaintiff's Exhibit 48 is the first one.

MR. GOLDBERG: Yes, actually, this is the demonstrative. The top exhibit is the fact exhibit and the next one, your Honor, is the one that you have there.

THE COURT: Okay.

MR. GOLDBERG: And that one was on top, but it's not the first one.

THE COURT: Defendant, will there be any objection to any of the exhibits that are in the folder and that would **[Page 80]** be Plaintiff's Exhibit 48, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89. Any objections? They're all admitted without objection. They may be used freely by either side.

(Plaintiff's Exhibits 48, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89 admitted in evidence.)

MR. GOLDBERG: Okay, great. I was going to wait until the end to move them, but that's fine.

THE COURT: We'll just get them in.

MR. GOLDBERG: Great, got them in.

THE COURT: Okay.

BY MR. GOLDBERG:

Q All right, can you explain Plaintiff's Exhibit 81 to the Court? Does this exhibit deal with this accusation that your benchmarks are so different from the Philadelphia DMA, because they are smaller and rural counties?

A Yes.

Q All right, go ahead and explain to the Judge what you did?

A Well, your Honor, what I did was, when that accusation was made, I went in and said, is that true. I wonder if they're all urban and rural and of course, what I found is, it's not true. In fact, Los Angeles County in California and Orange County, in California, are both in there, as you see.

Q In your benchmark?

A In the benchmark, yes.

[Page 81]

Q That's not a rural county?

A I don't think so. The last time I was there.

Q Would you call it small?

A I wouldn't call it small.

Q Go ahead, sir.

A Sacramento, California is in there. Dallas, Texas is in there. Marian County, Indiana, which is where Indianapolis is, is in the benchmark. Fulton County, Georgia, have to fly through to get in and out of Gainesville and Atlanta. Gwyned (ph) County, Georgia, which is an Atlanta area, metro area county. And Salt Lake City, Utah, just a few.

Q Now, this is just -- you're just doing the same thing that Dr. Chipty and the defendants did. You're just pulling out some counties?

A Yes.

Q Did you do what statisticians do to determine whether your benchmark is smaller?

A Yes, I wanted to see what the range of size and population was and clearly, as defendant's have shown, there are some pretty small places, rural places in there and there are some, obviously, very big places.

Q So, what did you do to determine statistically?

A Well, yeah, then one of the things I looked at was, since we're talking about Comcast Cable prices, is what fraction of the subscribers in my benchmark live in relatively urban **[Page 82]** areas. The Census Bureau classifies every county in the country every ten years, as either more urban than rural or more rural than urban. And as it turns out in my benchmark, 86 percent of the Comcast subscribers in the benchmark, reside in counties that the Census Bureau calls more urban than rural.

Q So, this is not your subjective judgment as to what's a rural county and what's an urban county?

A No, that's based on the census.

Thank you. (Pause.)

Q In one of your answers, when you were responding to Judge Padova, you talked about the dependent variable, do you remember that?

A Yes.

Q So, I want to talk about the variables that are in your model.

A Okay.

Q What is the dependent variable in a multiple regression model?

A The dependent variable in a multiple regression model is the variable on left-hand side of the equation. It's the variable that's being studied, that is of primary interest.

Q What did you select as the dependent variable for your multiple regression model?

[Page 83]

A The variable of interest in this case, which is the price of the expanded basic service, cable service.

Q Why the expanded basic cable service?

A Because it's my understanding that the class consists of or the period of class is defined as those people who take the expanded, who get the expanded basic service.

Q And what data did you use to determine the price of the expanded basic cable service for your dependent variable?

A I used Comcast's own data. The data that were produced by Comcast.

Q In this case?

A In this case, yes.

Q And does Dr. Chipty, that is defendant's expert, does she specify any multiple regression models for the purposes of showing whether there will or will not be damages because of the antitrust (inaudible).

A She specifies a large number of multiple regression models, yes.

Q Across the whole list of her reports, in this case, how many multiple regression models does Dr. Chipty specify?

A I've counted 51 models that use the expanded -- the basic expanded price for cable.

Q 51 multiple regression models?

A Yes.

Q And in -- what does she use as the dependent variable in [**Page 84**] her models?

A In those models, she is using that expanded basic price.

THE COURT: From Comcast data?

THE WITNESS: Not always, your Honor. That's one of the areas where we disagree.

Q In her initial report, her initial report, did she use all these -- the Comcast's own prices to represent the standard basic cable price or did she use something else?

A She used something else, in addition to the Comcast price.

Q What was it?

A Data from something called the Fact Book.

Q And what is it -- and again, was that represented to be Comcast pricing?

A There are some prices in there that are represented to be Comcast, but there are also other -- there were prices that are represented to be other cable provider prices.

Q In the Fact Book?

A In the Fact Book.

Q Did you use the Fact Book data to represent Comcast's expanded basic cable service price?

A I did not.

THE COURT: Where does the data in the Fact Book come from?

THE WITNESS: That's a publication by Warren **[Page 85]** Communications and they survey franchises across the country and ask them to respond, fill out a survey form. The survey ultimately goes to the cable provider, because they're asking about things like price, subscribers, number of subscribers and so forth. So, ultimately, it comes from the cable companies responding to this Warren Communications Company survey.

Q And we're going to talk about, later on, we're going to talk about the difference between the Fact Book data and the Comcast data, with respect to which better represents the actual prices for expanded basic cable. But I want to go on. Is there then any real difference between you and Dr. Chipty conceptually, about what should be the dependent variable in a multiple regression model to estimate damages here?

A I would say, in a conceptual sense, no.

Q And so what are the differences between you and her, as to the dependent variable?

A As to the dependent variable, it's which data is most appropriate to use and also how to actually calculate the price, once you have the data.

Q Okay. And we'll talk about that later. Now, I want to turn to the right-hand side of the equal sign and talk about what variables you have on the right-hand side.

THE COURT: Incidentally, Doctor.

MR. GOLDBERG: I'm sorry.

[Page 86]

THE COURT: Excuse me one second, Mr. Goldberg. Do you have this equation laid out anywhere or Counsel?

MR. GOLDBERG: No, but we will, by this afternoon.

THE COURT: I want to see it.

MR. GOLDBERG: I'm going to have it.

THE COURT: Okay.

MR. GOLDBERG: It's actually in the reports and I'll make reference, but I'm going to have --

THE COURT: A chart?

MR. GOLDBERG: -- yes, blank pages where he can come down and write it out.

THE COURT: All right.

MR. GOLDBERG: It just wasn't here and --

THE COURT: Okay.

MR. GOLDBERG: -- I apologize, I should have brought it with us. But we will have it after lunch.

THE COURT: So, now we're on the right side?

MR. GOLDBERG: We're on the right-hand side.

Q What do you call the variables that are on the right-hand side?

A Independent variables is probably the most common term for them. Also, synonymously explanatory variables, which I think says a little bit more about what they're supposed to be doing. The idea is that these are the variables that provide some relationship or explanation for the variable on **[Page 87]** the left-hand side.

Q Is the only thing that provides relationship or expectation in the multiple regression model the variables that are on the right-hand side or are there other things that also address the relationship of the dependent variable to important factors?

A There are other things, besides just the variables on the right-hand side.

Q Now, again, you remember I asked at the beginning and with reference to Mr. Shuster and the defendant's brief, they say the only two variables we have are number of channels and median income, right?

A I think that's what they said, yes.

Q Yes. What are the variables, first of all, is that right?

A That's not right.

Q What are the variables that you have on the right-hand side?

A All right, so, as I think I said earlier, I have median income on the right-hand side, as both a demand and possibly a cost variable. I have channel capacity, not number of channels. Channel capacity, which gives us some idea of the size of the system. The ability of the system to grow to a certain number of channels. Which again, is probably primarily a cost variable, because, obviously, the bigger the [**Page 88**] system, the higher the cost.

I also have a variable in there for over-building. It's actually called an indicator variable. Either a place is over-built or it isn't.

Q Sometimes an indicator called a dummy variable?

A It's also called a dummy variable. An unfortunate term, I think, in statistics.

Q Yes, statisticians are the -- at least, the ones who testify in court, apparently don't like to call them dummy variables any more. So, they're now called an indicator variable.

A Right.

Q But it's a -- we'll refer to them as dummy variables.

A My own books call them dummy variables.

Q Okay. So, you have a variable for over-building?

A Yes, there's a variable in there to measure. Again, one of my understandings of the Complaint in this case, is that the alleged anti-competitive behavior constrained over-building in the Philadelphia market. Well, in order to measure the affect of that, again, if it's proved to be true, I needed something in

my model that was measuring the difference in price between places that are over-built and places that are not over-built.

THE COURT: So, the right side, places that are over-built.

[Page 89]

THE WITNESS: And places that are not, but, then well --

Q Explain to the Judge how a dummy variable works.

A So, in the benchmark, we have some places, most places that are not over-built and we have a small number of places that are over-built. And so, this variable that I put on the right-hand side will treat those places that are not overbuilt one way and those places that are over-built another way and tell me, when we put the equation up this afternoon, tell us what the difference in price is between the two. So, that when somebody says how much difference does it make in price if the place is over-built, there's an answer.

Q So, you have a demand proxy, primarily demand proxy. A variable, you have a supply proxy or cost proxy primarily variable.

A Right.

Q You have your variable for over-building.

A That's correct.

Q Is that all of the variables you have over there?

A No, there's another set of variables, your Honor. The price data that we obtained or that Comcast produced, covered the period from 2003 to 2008.

Those were the years for which we were able to get relatively complete data nationwide. Clearly, a time affect -- there's a time affect on price. Typically, prices change every January. So, to capture that **[Page 90]** time affect, we put an indicator variable or dummy variable in for each year, which captures effects of changes in price over time, that might be due to inflation, it might be due to changes in demand, changes in cost, changes in supply, technological changes. But, at any rate, the concept of putting these year dummy variables in is to capture whatever it is that's causing prices to change over time.

Q Using an annual dummy variable to capture variation in price, because of time, is that some technique that you made up?

A No, no, it's quite common. It's, I would say, the most common way of capturing time changes.

Q And within the discipline of statistics and econometrics, is it well accepted that if you are using a multiple regression model to estimate damages in a case like this, that that type of variable is appropriate to use?

A Yes.

Q After investigation, et cetera?

A Well, sure, you're going to look at the results, just as we did with all the variables we put in and see if it makes sense. I mean, if I see an indicator variable that indicates prices are lower --

THE COURT: Do you have water?

THE WITNESS: I do, thank you, your Honor.

THE COURT: I'm sorry for interrupting.

[Page 91]

THE WITNESS: That's all right. If I see an indicator variable that says prices are lower in 2008 than they were in 2004, again, I'm going to want to look and say, gee, you know, there's something wrong with my data, something wrong with my model. I mean, I'm expecting prices to sort of march up over time and had I seen something to the contrary --

THE COURT: Or they could be technological changes?

THE WITNESS: Absolutely, absolutely. Which, again, would tend to drive prices up.

Q Okay, so, you have your supply proxy variable. You have demand proxy variable, your overbuilding variable and your set of dummy variables to capture the effect of time?

A That's right.

Q Any other independent variables on the right-hand side of the equation?

A No.

Q Now, you testified earlier that the variables are not the only way to account for damages?

A That's right.

Q Does your model account for, as an example, difference in DBS penetration?

A It does. It goes back to the definition of the benchmark.

Q And is that an appropriate way, in the type of model that **[Page 92]** you specified, to account for that factor?

THE COURT: What factor are you talking about?

MR. GOLDBERG: DBS penetration, your Honor.

THE WITNESS: Yes, as his Honor said earlier, it is – it's required. If DBS penetration is one of the factors that is alleged to have been affected by the anti-competitive behavior, then we need to control for it and the way to do that or one way to do it, most common way in my experience, is to find markets where that constraint doesn't exist and thereby, control for DBS penetration.

Q So, if somebody criticized your model for not controlling for DBS penetration, would that be a fair criticism, in your opinion, Dr. McClave?

A No, that's absolutely contrary to what I did. No, it wouldn't be fair.

Q And again, just so the record is clear, that methodology for controlling that you've used in your model, is that accepted within the discipline of statistics and econometrics?

A Yes.

Q In your books, do you teach that?

A Well, you know, there are some examples of antitrust damages in there, but, yes, we certainly talk about controlling for factors by sampling the right population. I mean, that's really what we're talking about here.

[Page 93]

Q Now I want to talk about another factor that's salient here or at least, is alleged to be salient here and that is clustering or the size of the MSO, you understand what an MSO is?

A I do.

Q Would you explain to the Judge your understanding of what an MSO is?

A Well, the operator, the major operator in -- major cable operator.

THE COURT: Multiple Service Operation.

THE WITNESS: Major cable operator, thank you.

Q And so, does your model, you don't have an MSO variable over on the right-hand side of the equal sign, do you?

A I do not.

Q Does your model control for the relative size of the MSO or clustering?

A Well, it certainly does with regard to Comcast, because we're looking at places where Comcast's share is relatively low or relatively lower than in Philadelphia.

Q Then --

A Yes?

Q -- as a screen in defining your benchmark area?

A That's right.

Q And so, if you are criticized, your model was criticized for not controlling or the relative size of the MSO, would **[Page 94]** that be a fair criticism?

A In my opinion, no. I think it doesn't.

THE COURT: Doctor, I don't understand that. Walk me through that again. What we're talking about is whether or not the model accommodates, you know, the size of the MSO.

THE WITNESS: Right.

THE COURT: Take me through that again, how does it do that?

THE WITNESS: Okay, so, it looks for -- counties is the unit of observation that I used, as that exhibit makes clear. I look for counties in which Comcast presence was less than it's national -- basically, it's national average is between 30 and 40 percent. It's percentage -- this is percentage of households, not cable subscribers. It's current level in Philadelphia is about 60 percent. I looked for places that were less than 40 percent. So, looking for places where it wasn't close to a clustering situation for them.

Q Now, Dr. McClave, I want to talk about the results of your multiple regression model. You've generally described and with some particularity, the specification of the model, how you came about it, your data that were employed, at least, for the dependent variable.

THE COURT: We'll be breaking for lunch in ten minutes.

[Page 95]

MR. GOLDBERG: Yes, your Honor.

THE COURT: Ten minutes, we're going to give you ten minutes.

MR. GOLDBERG: This will take around ten minutes.

THE COURT: Sure, that's what I expected, results.

MR. GOLDBERG: We're actually getting to more of a well-oiled machine here, your Honor.

Q If you'll step down from the witness stand, Dr. McClave. I'm showing you what is Plaintiff's Exhibit 79. Can you explain to the Court, with reference to Exhibit 79, the results of your model?

A Well, this is definitely a high-level overview. What, in essence, I described before, we have the benchmark, we have the model that's just been described. We can use that model to estimate prices in Philadelphia, which is what I did.

Q But-for prices?

A But-for prices. And when I compared the but-for prices to the actual prices and did all the arithmetic, the total was, I think, made clear and it was $876 million total, for all years.

THE COURT: The cost of the service in Philadelphia was $876 million more?

THE WITNESS: That's right. Subscribers for extended basic service paid $876 million. Counsel asked me whether or not -- part of my assignment was, is that true **[Page 96]** over the entire period of the data that you have and it was. In each and every year, there was a positive and significant event.

Q So, we have a clear record, in each and very year that you could observe?

A Yes.

Q And you observed 2003 through 2009, is that correct?

A 2008. You also asked me and one of the reasons, your Honor, that I use county as the level observation, is because if I had used the whole DMA, I'd be just giving one number, yes or no. But I wanted to look at some more granular level and deter-

mined that county was the level that I could measure with some level of statistical --

THE COURT: Incidentally, you've been referring to the left side as Philadelphia. What's constituted -- what is Philadelphia to you? You're estimating what the amount of damages in the Philadelphia area. What is the Philadelphia area you're talking about?

THE WITNESS: The 16 counties in which Comcast has a presence. So, in those 16 counties, I looked to see in each of those years covered, 2003 to 2008, were there exceptions? Were there counties in which the prices were below my estimated but-for competitive price and the answer was no. So, in all counties and all years, my model indicated a super-competitive price or an overcharge that, when I added **[Page 97]** it all up -- and by the way, I used the model to estimate what it would have been in previous years by forecasting. But at any rate, when I added it up over the entire class period, that's where the $876 million came --

THE COURT: Are you finished with this?

MR. GOLDBERG: Almost.

THE COURT: Okay.

Q That last aside, when you say -- when you talk about forecasting, you're talking the years 2000, 2001 and 2002?

A Yes.

Q All right, can you explain to the Judge what you did for those years, where you actually did not have data that you could observe?

A I didn't have data there, so, I took for each of the counties, the average over the other years,

percentage wise, what the overcharge had been and estimated that for the first three years.

Q Has anybody, so far -- has anybody in this case complained about that back-casting?

A I don't believe so, no.

Q And then finally, are there measurements that I call outputs, are there measurable outputs from a multiple regression model that will tell you how good, statistically, the model is working?

A Yes.

[Page 98]

Q Would you describe for the Court, first, what those outputs tell as to your model?

A Well, as I mentioned before, we need to know whether the model makes sense or whether the factors in the model on the right-hand side, have the right sign, have the expected sign. And moreover, your Honor, whether they are statistically significant. In other words, it's possible, when you fit a model, that you get a co-efficient on one of the equation, its just a matter of chance. It's just random from the data. As opposed to a real relationship, something that's indicated to be statistically significant. So, there are ways we measure that, they're called T-statistics and that's an output, as Mr. Goldberg calls it, of the regression model process.

There's also something called R-Square, which is the percentage of the variability in prices that your model explains on a scale from zero to 100 percent. We know, going into any econometric model, we're not going to get 100 percent explanation. There's random things that affect prices. But we also are hoping we're not going to get ten percent or less. So,

you know, we look at what the R-Square is to see how much we're explained. So, those are two of the most salient things that we look at to see are the statistical results reliable.

Q Let's talk about each of those separately first. Did **[Page 99]** your model tell you, these co-efficients -- did your model tell you -- I'll ask it a different way. Can you determine whether these co-efficients did, in fact, satisfy your a priori expectation, that is, they were the right sign. They were a positive where you were expecting it to be positive, negative where you were you expecting it to be negative?

A I did.

Q And what did it show you?

A Every one of them had the sign that I expected and that theory would tell us was to be expected.

Q Every one of them?

A Every one.

Q Without exception?

A No exception.

Q Okay, now, did you investigation the T statistics to determine whether these co-efficients, that are an important part of the equation, whether these co-efficients are statistically significant? That is, they actually show a relationship rather than, as you described, some random connection?

A Yes, I did look --

Q And what did that show you?

A Every one of the factors on the right-hand side had a statistically significant T value, meaning its unlikely that any of them are just exhibiting some sort of random **[Page 100]** relationship to --

Q Among econometricians, is there a widely accepted T value that tells you whether your co-efficients are sufficiently, statistically significant to be relied upon?

A Yes.

Q And what is that, if you can just state it for the Court?

A Well, approximately, a T vale of two, which means its more than two standard deviations away, you obviously like it the further it gets away. But once its two standard deviations, then we can say there's only a five percent chance that you would observe that value that big, if there were no real relationship. And so, we call that the five percent level of significance and that's the most widely used by statisticians.

Q And did every one of your co-efficients have a T statistic that satisfied that five percent value?

A Yes.

Q Were some of them even smaller than five percent?

A Yes, most of them. In fact, I think all of them were statistically significant at less than one percent.

Q And that's better than five percent?

A Yes.

Q All right, the smaller the T statistic, your Honor, the better it is.

A Actually, not the T statistic –

[Page 101]

THE COURT: No.

THE WITNESS: -- the significance level, the smaller one.

Q I'm sorry, I shouldn't be testifying any way. Okay, now, you mentioned the R-Squares, did you calculate the R-Squares for your model?

A I did.

Q And what were those R-Squares?

A The R-Square was 47 percent, meaning this model was accounting for 47 percent of the price variability in the benchmark market.

Q Is that a relatively bad fit? Is that a relatively terrific? Are we popping the champagne bottle corks or are we crying in our soup?

A That's a good question. It really depends so much on the application. I would, in my experience, if we get up around 50 percent in econometric models, where you're trying to explain things like price or demand or whatever, you don't so well. There may be exceptions, there are exceptions where you can get higher than that, obviously.

THE COURT: What's that R-Square indicate? What's the 47 percent to 50 percent indicate?

THE WITNESS: All right, so, your Honor, if we had no model at all, nothing on the right-hand side, we would be explaining what -- zero percent of the price variability, so, **[Page 102]** that's where we start. And the question is, after we've added the variables on the right-hand side, where did we get to? How much of that total variability in price are we

explaining? And in my model, it was 47 percent and that, as I said, in econometric models, you're starting to get into a territory there that's --

THE COURT: Does the $876 million damage estimate reflect?

THE WITNESS: I would say those are underlaid. In other words, you could get an $876 million and in theory, with a ten percent R-Square or a 90 percent R-Square. It's really just telling us how's your model doing? Are you doing a reasonable job, I mean, if I came to court with a model that had a five percent R-Square, I'd be saying, you know, there's 95 percent of the variability that's unexplained here. That's not very good in my opinion, in my estimation. So, from a statistical point of view, it's just a number we look at to say, where are we on the spectrum. Where are we in our experience with econometric models.

Q Let me ask the question slightly differently. The $876 million damage calculation that you made here, this arithmetic. Is that based on your model that has a 47 percent R-Square?

A It's based on my model, yes, sir.

MR. GOLDBERG: This is as good a time as any to **[Page 103]** break for lunch, your Honor.

THE COURT: One final question.

THE WITNESS: Yes, sir.

THE COURT: The person in the back row has just said to me, Judge, you can't decide this case on the basis of 47 percent shot that it's right. What about that?

THE WITNESS: Yes, I would say to the person in the back row, that's misrepresenting R-Square. There's not a 47 percent --

THE COURT: Well, then I'm not so sure that I understand R-Square. After lunch --

MR. GOLDBERG: That's fine, I'll --

THE COURT: -- you'll take me through it again, okay?

MR. GOLDBERG: When you say you're not sure you understand, then I can promise you we'll get back to it after lunch.

THE COURT: Thank you. We stand in recess and please be back 1:30.

THE CLERK: All rise.

(Court in recess; 12:25 to 1:35 o'clock p.m.)

MR. GOLDBERG: I apologize --

THE COURT: That's all right.

MR. GOLDBERG: I apologize for being late. There's common law and there's Murphy's law, and today is one of **[Page 104]** Murphy's law's days.

THE COURT: Okay.

MR. GOLDBERG: And if I can ask the Court's indulgence for a couple more minutes?

THE COURT: Sure.

MR. GOLDBERG: I'm having some technology problems, which --

THE COURT: Okay.

MR. GOLDBERG: Okay? I'm sorry, your Honor.

(Pause.)

THE COURT: Maybe the witness can re-explain to me the R squared while we're waiting.

THE WITNESS: I'd be glad to try, your Honor.

THE COURT: Go ahead. Sure.

THE WITNESS: So, basically R square is one of many statistics we look at after fitting a regression model and what it is, literally is a measure of the percentage of variability in the dependent variable, in this case price, in the benchmark, that's where we're estimating it, that is explained by the right-hand side of the model. We start with the idea that there is an explicit term in the model called the error term, the random-error term; we know that that's always going to be there, we can't explain 100 percent. So, there is some percentage that is explained and that's the R square.

[Page 105]

Typically, if you're working in the hard sciences -- my original major was physics -- if you're working in physics, you might hope to have models that are in the 70, 80 percent, so that the random error is ten or 20 or 30 or 40 percent. In the soft sciences, the social sciences like economics, typically good models are in the 50-percent range, because the random component is always going to be a substantial part of the model. So, it's a relative measure from zero to a hundred, but it has to be taken in context with the other things that we talked about. Does the model make sense? Are the signs appropriate? What about the T statistics, are they indicating statistical significance? So, there are a number of things that we look at. The standard -- what we call the standard error of the model, we haven't really discussed, but there are probably half a dozen statistics, R square is one of

them. But the fact that -- the fact that -- it's tempting to say, well, 50 percent, does that mean you're 50-percent wrong? No, that's not right. It means that 50 percent of the variation is random, it's just not explainable, because in the social sciences that's life, that's the way it is.

So, I don't know if that helps, but that's --

THE COURT: Okay.

MR. GOLDBERG: May I follow up, your Honor, with a couple questions?

[Page 106]

THE COURT: Go ahead, you can proceed.

MR. GOLDBERG: I'm still not quite there yet, but I'm getting there, your Honor.

BY MR. GOLDBERG:

Q The R square, Dr. McClave, does the -- you testified that the R square measures how much of the variation in the dependent variables can be explained.

A Correct.

Q Does the R square measure that variability for the overcharge?

A No, not at all. The Philadelphia prices play no role in the R square. Remember, were fitting the model to places outside of Philadelphia. So, the amount of variation in price in Philadelphia is inconsequential as far as R square is concerned.

Q Does the R square address the variation in price explained by the model in the benchmark area?

A That's what it does.

Q So, when you as a statistician or an econometrician are looking to determine the goodness of the fit of a model, as we say, or how good the model is doing, do you look just at the R square?

A No, no. In my books, you'll see this is one of a number of measures. In fact, your Honor, one way you can drive R square up, that is invalid statistically, is to start to **[Page 107]** throw garbage in the model, variables that make no sense, R square will inevitably go up by some fraction for that. But then we look at it and we say, well, wait a minute, the signs of these variables don't make sense, the T statistics don't make sense, this is -- this is not the way to fit a model. So, R square is not by far the only thing we look at, it's one.

Q And we talked about another measurement of how good the model is working and that was the T statistic. When you're looking to determine whether the model is good, do you look just at the T statistic?

A No, it's just one of the numerous factors we look at.

Q And another factor that you looked at, another output that you looked at, that you explained to Judge Padova this morning that you looked at, was were the signs going in the direction; do you look just at that?

A No. It's, again, one of the several factors that we take into account.

Q In addition to all of these factors that we talked about this morning and this afternoon, do the software programs, do the statistical software programs push outputs that you look at?

A Yes. In this day and age with the computers, there's no lack of output and we look at the whole array before we say, yes, that's the model that I believe is the most reliable.

[Page 108]

Q And did you look at all of the outputs with respect to your model?

A I certainly did.

Q Did any of those outputs that measure how good the model is working statistically, were any of them such that they failed an objective test?

A No, they all passed.

Q Were any of them ones that caused you as an expert in statistics or econometrics to raise your eyebrows and say, boy, I better look at this? Once you actually specified your model.

A In the final model that I utilized, none of them caused me to raise my eyebrows, as you put it.

THE COURT: See, I mean, they may have all passed, but what was the passing grade.

BY MR. GOLDBERG:

Well, again, is it -- as to the R square --

THE COURT: It doesn't tell me too much when you say they all passed. What was the passing grade?

MR. GOLDBERG: Well, sure, I'll talk about that, your Honor.

BY MR. GOLDBERG:

Q You did say that there is an objective, widely accepted passing grade for T statistics, correct?

A Yes.

[Page 109]

Q Did your models, all of them, pass that?

A Pass that? Yes, absolutely.

Q Did they get just a passing grade or did they get an A?

A Well, as I stated this morning, they all passed at the one-percent level of significance where five percent is the --

THE COURT: Tolerable?

THE WITNESS: -- yes, is standard.

THE COURT: Five percent is tolerable, they went to one percent.

THE WITNESS: They went to one percent. So, I would say they passed with flying colors.

BY MR. GOLDBERG:

Q Would you say that five percent is tolerable or would you say that five percent is accepted by the discipline as showing that these are statistically significant?

A When people write papers in statistics and econometrics, they have nothing to do with litigation, if the factor is significant at five percent, they're calling that important, you know, it belongs in the model, it's something that people ought to consider.

Q Now, is there is a widely accepted measurement of acceptability for the R square as there is for the T statistic?

A No, there is not, that's the issue.

[Page 110]

Q Recognizing that, from your experience, I mean, your expertise in this, what kind of grade would you give your R squares here?

A I'd give it an A.

Now, overall, when you look --

THE COURT: You corrected your own test paper. (Laughter.)

MR. SHUSTER: We would all like to do that.

THE WITNESS: Your Honor, trust --

THE COURT: That's okay, there's room for that as a witness.

THE WITNESS: Trust me, there are a lot of people back there that are also grading it.

THE COURT: Okay. All right, Counsel, I think I know where we are with respect to what I raised.

BY MR. GOLDBERG:

Q One of the other questions the Judge asked this morning that I'd like you to address, if you can just step off the stand, is the Judge asked if you would write out the equation that constitutes the specification in your model. Would it help you to have one of your reports to --

A It would.

Q All right, great. Your reports are in here, pick out the one. And in fact the information that describes the equation is laid out in the appendix to one of your reports, is it **[Page 111]** not, Dr. McClave?

A It is. So, your Honor, I am looking at... the

third page of Appendix A in the corrected expert declaration, dated May 4, I believe -- yes.

THE COURT: The third page of Appendix A?

THE WITNESS: Yes.

THE COURT: Okay. I have it.

BY MR. GOLDBERG:

Q Show him what it looks like, Dr. McClave, so were on the same page. I'm going to give you one of these markers here and ask you, with reference to your report, if you would write out your equation?

A Sure. So, your Honor, I'm looking at the bottom of the page, the bottom half that says, "Parameter estimates." Those parameters are the -- the parameters are the actual variables in the model and the estimates I called coefficients earlier or weights. And so I said it was an equation and it is. It's probably a little more complicated than one might think, but here is the left-hand side of the equation --

COUNSEL: Excuse me, your Honor, I'm sorry to interrupt, but do you mind if I just stand up here so I can see?

THE COURT: No, no, by all means, do it.

THE WITNESS: So, this is the Expanded Basic price. **[Page 112]** In econometrics, we often take the natural logarithm, which was what that little l-m means, because that allows us to get estimates that make, I'm going to say, better economic sense. They measure things like elasticities of demand and supply if we use the logarithm. So, its actually what we call a transformation of price, that when we come back and estimate price we can then un-transform it

and get back to a price. So that's my equal, that's on the left-hand side of my equal sign.

All right. The first thing you see there is an intercept; that's a constant, that's sort of like the mean value, and you can see that that -- and, your Honor, if it's okay, I'll round these off to about two decimal places --

THE COURT: Sure, that's good.

THE WITNESS: -- instead of writing them all the way out? So that would be -- the constant would be -- I'll put it up here -- 2.84.

THE COURT: All right.

THE WITNESS: All right? Then come the year indicators. All right? So, plus, if it's year '03, it's going to get a multiplication of minus 0.31. Do you see that?

THE COURT: Yes.

THE WITNESS: If it's year '04, that's going to get multiplied by minus 0.24. If it's year '05, the weight is **[Page 113]** minus 0.15.

THE COURT: Where do these parameter estimates come from?

THE WITNESS: From fitting the data to -- you see the number of observations at the top there?

THE COURT: Yes.

THE WITNESS: And it says, "Number of observations used, 615"?

THE COURT: Yes.

THE WITNESS: That would be 615 prices over this period in the benchmark.

THE COURT: Okay.

THE WITNESS: Those data are what are determining these weights.

THE COURT: Okay.

THE WITNESS: Year '06, I think is where I am?

MR. GOLDBERG: Yes.

THE WITNESS: Minus 0.09. And, year '07, minus 0.04.

And, your Honor, I want to point out that the computers may carry these things out to umpteen decimal places --

THE COURT: Sure.

THE WITNESS: -- as opposed to what I'm doing.

Now, you'll notice there's no year '08 in the model, **[Page 114]** but we have year '08 data. Basically, year '08 is acting as the baseline against the -- which the other years are being --

THE COURT: Measured.

THE WITNESS: -- compared.

THE COURT: Right.

THE WITNESS: And these, because I used this transformation, these numbers can tell me how much different the prices are. So, 0.04, minus 0.04, means that the prices in year '07 in the benchmark were about four percent lower than they were in '08; the prices in '06 were about nine percent lower. Do you follow me?

THE COURT: Yes.

THE WITNESS: And, year '05, about 15 percent lower; year '04, about 24 percent lower; year '03,

about 31 percent lower. So, in each year, if I turn that around and go in the opposite direction, we're seeing an increase in price, as expected.

And if you move over, before I go to the next variable, and look at the T values for the years, the first one is 17.69 for year '03.

THE COURT: Right.

THE WITNESS: Those are what I mentioned are all well into the range of less than 0.05 and even 0.01. In fact, the next number beside the 17.69 tells you that it's **[Page 115]** less than 0.0001, one in 10,000 is what that would be as the level of significance.

BY MR. GOLDBERG:

Q As opposed to 0.05?

A As opposed -- typically, if its less than 0.05, its acceptable; from a statistical and econometric, these are well into -- obviously, way, way smaller than that.

Q Orders of magnitude?

A Yes. Okay?

THE COURT: Okay.

THE WITNESS: So, then the next variable is the natural logarithm of income. Its actually the median income of the counties and you put median income. And that gets multiplied by its weight, which is 0.07. And what that tells us is, again, that as median income increases there will be an increase in price, on average. And, again, it can be measured as an elasticity. So, as it turns out, its -- for every ten-percent increase in median income, its about a 0.7-percent increase in price.

So, these weights can all be interpreted, is the point. But, again, look at the T statistic for it, you'll see it's 3.73 and its significance level 0.0002.

BY MR. GOLDBERG:

Q And, again, that's an order of magnitude better than what the -- the five percent?

[Page 116]

A That's correct. Yes, I think I said earlier that all these pass at a level of one percent, it's actually one tenth of one percent; all of them are smaller than 0.001, I believe.

The next one is log of channel capacity, that gets a weight of 0.06. Again, positive; again, telling us that places that have higher channel capacity are going to be charged more for the expanded base of service and statistically significantly more, because the T value is 4.81 and of course the T value -- the significance level is, again, less than 0.0001.

And, finally, this over-built indicator variable or dummy variable, has a weight of minus 0.10. What that's telling us, your Honor, is, first of all, it's statistically significant, you see it's T value is 4.13. What that's telling us is, if you have an over-built community or market, on average, you're going to pay ten percent less in price. This is a direct reflection of the amount.

Q Is that what you would expect economically?

A It's what I would expect economically and, as I point out in this report, it's actually less than many of the FCC estimates. Their estimates are up in the 14, 15-percent range. But, yes, I would expect this to be negative and significant, and in fact it was.

The R square that we have been discussing, you can **[Page 117]** find that, your Honor, if you look up a little above the parameter estimate, there's something called, "R square," and it says, 0.4683, that's what I told you was 47 percent.

Another thing, your Honor, that I didn't mention, Mr. Goldberg asked me about the test of the model. If you'll go up to what's called the "Analysis of Variance," and look at something called the F value, which is 66.7, that's a test of the significance of the whole model, whether the whole model is statistically significant. And, again, you see that it's significance level is less than 0.0001.

So, as I testified, this equation for Expanded Basic price in the benchmark is passing with, in my view, flying colors all of the statistical tests to which it was put.

Q Before you go back on the stand, Dr. McClave --

MR. GOLDBERG: -- if I may approach the chart and the witness, your Honor?

BY MR. GOLDBERG:

Q Before you get back on the stand, first, would you put your initials down there?

(Pause.)

MR. GOLDBERG: Your Honor, I'm putting a label, an exhibit label, Exhibit 51, which I understand, your Honor, I have been told, is the next available Plaintiffs' --

COUNSEL: 57.

MR. GOLDBERG: Oh, well –

[Page 118]

THE COURT: 57.

MR. GOLDBERG: It tells you how good a reader I am, your Honor. I'll change this when I get it on here.

THE COURT: It's admitted, P-57 is admitted.

(Plaintiffs' Exhibit Number 57 received into evidence.)

BY MR. GOLDBERG:

Q Before you leave, Dr. McClave, I want to ask you a couple more questions and then well get off of the actual equation.

Some of these variables on the right-hand side you identified as indicator or dummy variables?

A Yes.

Q Would you -- with this red marker, would you just underline those dummy variables?

A So, each of the year variables is an indicator variable for that year, again, using '08 as the benchmark or comparison here, and the over-built variable.

Q And that's the red underscore. And then, with the blue marker, is it correct to refer to these other variables, the median income and the channel capacity variables, that is your supply-and-demand variables, as continuous variables, is that what econometrics are calling them?

A Continuous or quantitative.

Q Would you denote the continuous variables with the blue underscore?

[Page 119]

(Pause.)

Q And, if you can, can you briefly explain to the Judge what the difference is between a dummy variable and a continuous variable, at least mechanically?

A Well, your Honor, a dummy or an indicator variable is yes or no, either it is 2003 or it isn't; it either means is over-built or it isn't. So, it's an on-off switch, basically, kind of variable. Whereas, things like median income and channel capacity we could measure on a continuous scale. Median income, you know, between whatever, 10,000 and 100,000 and so forth. So, those things that are not just on- off switches, those are quantitative or continuous; those that are on-off switches, that's what indicator variables are.

Q Is a dummy variable better than a continuous variable or worse than a continuous variable?

A Just different. It's a way to measure things that are -- we call them binary, things that are either yes or no. And, so, they're important variables. It's important to have the ability to put both kinds of variables in the model.

Q Will a dummy variable give you a coefficient that then gives you the recipe for the weight?

A Yes.

Q And each of these dummy variables did give you a coefficient?

[Page 120]

A Yes.

Q Just as the continuous variables gave you a coefficient?

A That's right.

Q Okay. Thank you, Dr. McClave.

Q Now -- oh, actually, if -- Dr. McClave, if you would step off, because we were actually in the middle of this Exhibit 79 and I want to complete it.

You have already testified that one of the results is that it allowed you to calculate $876 million in damages and that -- those damages reflect the overcharge to the class?

A Yes, it's the application of this equation into Philadelphia to estimate price, and then the comparison of that price to the actual price, and then it's multiplication.

Q Now, the equation doesn't actually show you the damages, does it?

A You mean if I just looked at this -- no, it has to be - again, this equation could have been put into Philadelphia and said prices are the same or prices in Philadelphia are lower. No, there's nothing about this equation that automatically generates damages.

Q But the equation did tell you that in every year there was an overcharge?

A That's right.

Q And for every geographic area, in every year, there was [**Page 121**] an overcharge?

A That's right.

Q And does that allow you to draw a conclusion as to whether the class class-wide was impacted by the behavior, if the plaintiffs prove their claims?

A In my view, this model and it's application to Philadelphia demonstrates with very little uncertainty that there was class-wide impact.

Q And then -- now, we did, we got -- hung up is the wrong word, I can't think of the right word, but we spent a lot of time talking about, again, these statistical results, they're reliable, they're robust. Tell the Judge what you mean, what statisticians mean when they talk about results being robust?

A Meaning that tests that we can do and I think that we're going to talk about, as far as making changes to the model, looking at different possible specifications, don't have a major impact on the result, that the model will stand up to tests, that's what robust means.

Q And then the final overview of the results, explain to the Judge what you mean by that.

A This is an industry that has been studied. It was mentioned in the opening, the FCC and so forth have studied this. So, one of the things I wanted to do is compare it in particular with some of the FCC -- what they do is, on a regular basis, they conduct their own survey; it's not the **[Page 122]** Fact Book that we talked about, this is the FCC going out and saying, we want to know what your price is in Franchise A and we want to know how many subscribers you have and so on. So, the FCC conducts its own surveys and publishes various statistics about -- and what they ask for is the Expanded Basic list price that -- the list price for Expanded Basic is what the FCC asks for. And so I wanted to see what the comparison of the FCC's average list price was to both Philadelphia and to my model to see if it was consistent.

Q And did you prepare a chart to help explain to the Judge what you meant by your model results being consistent with other findings?

A I did.

Q Let me put an exhibit label on this.

(Pause.)

Q I'm showing you, Dr. McClave, what we have marked and have been admitted as Plaintiffs' Exhibit 80. Would you explain to the Judge what -- how this shows that your results are consistent with other findings?

A All right, your Honor. Well, there's obviously four lines on here. So, I'll take the top line first. The top line are the average annual prices in Philadelphia over the period -- well, I'm showing 2000 to 2008 here --

THE COURT: Where did that data come from?

THE WITNESS: Those data came from Comcast.

[Page 123]

BY MR. GOLDBERG:

Q Well, they didn't go to you from Comcast, did they?

A No, they came indirectly to me.

Q How did --

A These are Comcast price data, is what I'm showing --

Q I understand, but I think the Judge may be asking -- maybe I'm misinterpreting the Judge -- I think the Judge is asking, these are Comcast prices, but where did you get --

THE COURT: Who gave them to you?

BY MR. GOLDBERG:

Q -- this representation of prices?

A Oh, plaintiffs' counsel, as part of production.

THE COURT: Okay.

BY MR. GOLDBERG:

Q Okay, great. Now, these are the actual prices, not the but-for prices, is that correct?

A That's right.

Q All right.

A The green line, your Honor, the solid green line -- I guess it's the only green line on here -- are the prices estimated by this equation on an annual average basis.

Q Your model?

A My model. So that came basically from the regression model fit to the benchmark.

Q This green line, does this green line represent then what **[Page 124]** sometimes is referred to as the but-for prices?

A Yes, that's right.

Q But the prices would have been --

THE COURT: Without the conduct?

MR. GOLDBERG: Yes, but for the conduct.

THE WITNESS: That's right. So, your Honor, the reason I put this up was then to compare it. And you can see what I said before that there is, according to this model, impact in every year.

What I want to compare it to was somebody totally separate, in this case the FCC surveys of price. So, the dashed orange line are the FCC survey prices, and these are national averages, in what they call noncompetitive areas, areas that are regulated and are designated, according to FCC criteria, as being noncompetitive.

The blue line, again, is from the FCC, the blue dashed line, is from the FCC survey also, those are in areas that the FCC calls over-built, it designates as over-built. So, in their survey they intend to get both non-over-built and over-built areas.

And so what I wanted to see was whether the competitive line that my model estimated made sense in light of the FCC surveys. And I took some comfort from the fact that, A, it was between the two and, B, if anything appears that might be on the conservative side in the sense it's **[Page 125]** closer to what they call noncompetitive than what they call over-built or competitive. And so this is what I meant when I said the results were consistent with other findings.

MR. GOLDBERG: Thank you, Dr. McClave. You can take the stand again.

(Pause.)

BY MR. GOLDBERG:

Q I want to turn now, Dr. McClave, to the differences or disagreements between your model and approach and --

THE COURT: And what? The differences between his model and?

MR. GOLDBERG: His model and approach and those of the defendants' expert on damages, Dr. Chipty.

THE WITNESS: Okay.

BY MR. GOLDBERG:

Q You testified this morning that across all of her reports she reported 50 or 51 multiple-regression models where she reported either no damages or negative damages or some level of damages, right?

A Well, I guess not all of those would be necessarily damage models, but they certainly were all criticisms or tended to be criticisms of either my work or somebody else's.

Q Do you and Dr. Chipty disagree about the basic methodology, that is the use of reduced-form, ordinary least-squares multiple regression model, as an appropriate way of **[Page 126]** estimating damages?

A I don't believe we do. My understanding -- and I have reviewed, needless to say, all of her models and the computer programs behind them -- she's using reduced-form, ordinary-least squares to fit her models.

Q All of them?

A I believe that's true -- there might be one exception, something she called a quantile (ph.) regression, but certainly 50 out of 51.

Q How would you describe then, overall, the differences, without going into particulars?

A Well, your Honor, first of all, I've already mentioned, we differ to some extent on how price itself ought to be measured, how the left-hand side of

that equation ought to be measured. We certainly disagree --

THE COURT: What was her view on that, as you understand it?

THE WITNESS: I'm sorry?

THE COURT: What was her view on that, as you understand it, or did it vary with the models?

THE WITNESS: It varied with the models and I think we're going to get into that.

THE COURT: Okay.

MR. GOLDBERG: Let me -- if I might, your Honor, let me follow up.

[Page 127]

BY MR. GOLDBERG:

Q Was there a dispute between you and Dr. Chipty as to the dependent variable price, was there a dispute as to what data she used?

A Yes.

Q At least at the beginning, is that correct?

A I think the dispute goes on, as far as I know.

Q Okay. And what -- to remind the Court, what data did you use to represent the Comcast Expanded Basic price?

A Comcast's own data, own database.

Q Their own internal data?

A Yes.

Q Produced in this case?

A Yes.

Q And what data did Dr. Chipty use to represent Comcast's Expanded Basic price?

A For a number of her models, she used the Fact Book prices, the prices from the publication Fact Book.

Q And is it correct that you and Dr. Chipty disagree about whether the Fact Book prices should be appropriately used?

A We do.

THE COURT: What's the disagreement?

MR. GOLDBERG: Go ahead.

THE WITNESS: The disagreement, your Honor, is when the Fact Book prices are checked. What we can do, because we **[Page 128]** have the Comcast actual prices, is we can see how well the Warren Communications surveys are working out, we can compare the prices in the Fact Book to the prices that Comcast turned over. In Philadelphia, there were 29 such comparisons that I could make, all of them were wrong --

BY MR. GOLDBERG:

Did you --

A -- the Fact Book was right on --

Q Did you produce a chart to help you explain this?

A Yes, it would help, that chart, yes.

(Pause.)

Q So, let me get a sticker on there, and then I'll ask you a question.

(Pause.)

MR. GOLDBERG: I'm marking what has been admitted as Plaintiffs' Exhibit 84.

BY MR. GOLDBERG:

Q And explain this chart to the Judge and what it shows.

A All right. Well, your Honor, this actually is looking at all -- first of all, at all 289 Fact Book prices for which we could also find Comcast actual prices. So, obviously, we couldn't -- well, maybe it's not obvious -- we couldn't check the non-Comcast prices, but we could the Comcast prices, many, many of them. These --

THE COURT: You're talking about what the Fact Book **[Page 129]** data recorded or had with respect to Comcast prices?

THE WITNESS: Yes.

THE COURT: And they're wrong?

THE WITNESS: And 90 percent, nine out of ten, was wrong.

THE COURT: Well, that's because, when you say they were wrong, they didn't agree with the information that was given to you with respect to Comcast prices as representing Comcast prices, is that correct?

THE WITNESS: Right, that's right.

THE COURT: That's why you concluded they were wrong?

THE WITNESS: Yes. And the fact that, for example, in the Comcast system, your Honor, we were given electronic data, we were also given some hard copy data called Rate Cards, you may have heard of but, at any rate, they show, the Rate Cards actually

show the derivation of the Expanded Basic price. And, so, we have several sources of the Comcast prices against which we were able to compare the

(indiscernible).

MR. GOLDBERG: Before we go forward, just so the record is clear, your Honor --

BY MR. GOLDBERG:

Q -- the comparison you're making is as to a particular model presented by Dr. Chipty, is that correct?

[Page 130]

A Any -- any model -- well, this is a comparison of prices, but this would affect any model in which she used, instead of Comcast price, a Fact Book price on this side of the equation.

Q What was your understanding as to what Dr. Chipty was presenting as the price; was she presenting a list price?

A Well, Fact Book in its surveys asks for a list price. So, yes, her Fact Book models would be list price models.

Q And what were you using in your model, were you using a list price?

A I used Comcast I used a list price, but from Comcast.

Q And, as you just explained to the Judge, you had two different sources for that list price, is that correct?

A In many cases, we were able to double check our -- the electronic data and our understanding of it, and that was pretty complex, from the whole nation,

five-year -- I mean, many, many hours. But, in order to double check, we had some rate cards that we were able to go back and verify that we were getting the right price.

Q Do we have a rate card as one of the exhibits in your...

(Discussion held off the record.)

THE COURT: What are we looking at?

MR. GOLDBERG: I have to get the exhibit, your Honor.

THE COURT: A rate card that he received from **[Page 131]** counsel, a rate card from Comcast?

MR. GOLDBERG: A rate card that -- this would be Exhibit -- Plaintiffs' Exhibit 48, also admitted, your Honor, and you have it.

(Pause.)

BY MR. GOLDBERG:

Q Would you explain to the Judge where you find the list prices --

MR. GOLDBERG: -- I'm sorry, your Honor, do you have the exhibit?

THE COURT: No, I don't have a 48.

(Pause.)

THE COURT: Okay, 48 is admitted.

(Plaintiffs' Exhibit Number 48 received into evidence.)

THE COURT: Oh, I did have one. Thank you. Okay, 48.

MR. GOLDBERG: Your Honor, I certainly can't complain about your not being able to find it.

THE COURT: No problem. Okay.

Q This is a rate -- this is what you've referred to, Doctor, as a rate card?

THE WITNESS: Yes.

THE COURT: And this was a hard copy that you got from counsel?

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THE WITNESS: Yes, that's right.

THE COURT: With your understanding that counsel had received this directly from Comcast?

THE WITNESS: Yes, that's right, your Honor.

THE COURT: Okay. And what did you do with this Rate Card?

THE WITNESS: All right. So, you can see this is for -- it says it's for Ocean County, LOC service prices effective January 1, 2008, over on the top left.

THE COURT: Yes.

THE WITNESS: And then if you move just to the right of that where it says, "Cable Service," and it's -- there are two columns, "Comcast Monthly Price," and, "New Monthly Price." It's kind of hard to read. The first line of which is the limited basic service, that's the -- if this is a regulated county, that would be a regulated portion, $15, and I think that's 15 cents, and I believe it's going to $15.90. Then the next is the Expanded service and you see that that's 38.10. And notice it's a significant jump, it's gone to 46.10.

THE COURT: 45.10, I get -- or is it 46?

THE WITNESS: You're right, your Honor.

THE COURT: 45.10, I see.

THE WITNESS: Thank you. When our people were checking these, they used magnifying glasses, as you might **[Page 133]** imagine.

THE COURT: Okay.

THE WITNESS: Then there's something called Value Pack, that's also been called -- by the way, your Honor, just since we're on this, the first service is often called B-1, that is the Limited Basic; the second line is often called B-2; and the Value Pack is often called B-3. And the Value Pack -- you can help me out there too -- 5.50, I think?

THE COURT: 5.50.

THE WITNESS: And then there's a footnote, which I am sure we're not -- at the bottom there that is going to be very difficult to read, but it does say that, "Effective January 1, 2008, Value Pack will no longer be included." In other words, what that footnote is basically saying is Value Pack has gone away and it's getting absorbed into B-2.

And then finally, your Honor, fortunately, they add it up for us. The "Standard Service" line of those three rows is, if I'm reading it right -- is it 58.75? -- going to $61.

THE COURT: Wait until I get that -- yes, 58.75 going to $61, yes.

THE WITNESS: Yes. So, it's what they call the Standard Service, what we are calling is the Expanded Basic Service.

BY MR. GOLDBERG:

[Page 134]

Q So, which price did you take off of this Exhibit 48 as the Expanded Basic price?

A Well --

Q The number, which number?

A Well, your Honor, we had the electronic database, thank goodness, we didn't have to look at these for thousands. But what we did was we confirmed that the number we pulled from the electronic database matched, in 2007, 58.75 and, in 2008, $61. So that's the price we used as the Expanded Basic price.

Q Now, so when you compared your determination of what were the Expanded Basic price list prices against the Fact Book data, you said this big red circle with the blue pie slice in it, that's all of the prices that you could compare?

A That's all 289.

Q Not just in Philadelphia?

A No. And, as I said, nine out of ten of these were wrong, disagreed with the Comcast data. And then we started looking for reasons. Could we match it to something else? Was there some way to --

THE COURT: Nine out of ten being wrong almost triggers in my thinking that we must be comparing apples and oranges. So, you -- you took that further and tried to figure it out?

THE WITNESS: Yes.

[Page 135]

THE COURT: And what happened?

THE WITNESS: We found out that 34 percent of them were a year old. In other words, what they were calling a 2008 price was really a 2007 price.

BY MR. GOLDBERG:

Q Did you match it up against the price that you had for 2007?

A In other words, it agreed with Comcast's previous year's price.

Q Did you have an understanding as to why that error would occur?

A Yes. We actually called Warren Communications and Fact Book and tried to find out how they do this. Basically, they produce a hard-copy book once a year, an electronic file every month, which is what we were using, electronic files, but they're relying on the cable providers to update the data for them. If they don't update, they just leave the other price, the old price up. And so four percent of the time it was off by two years, they were two-year old data.

Q So, it was represented to be a 2000 and -- what year is this supposed to be, 2007 or 2008? Well, whatever it is.

A These were mostly 2008 prices.

Q So, if it was represented to be a 2008 price, it was in fact a 2006 price?

A That's right. Another thing that happened, your Honor, **[Page 136]** fairly often, 11 percent of the time, is that prices included the basic component charge twice. Now, here's why that happened. If you go back to this Rate Card --

THE COURT: Right.

THE WITNESS: -- you notice that when they get to standard service, they've got to do addition. Okay? Well, sometimes when it gets reported to the Fact Book, instead of the numbers that you're supposed to add together, they report the B-1 price, the $15 price, and then they report the total and without telling you that it's the total. And so if you're just forming an algorithm, I've got to add these two together, you're adding the basic service input twice. And so that happened a little more than ten percent of the time in the data that Dr. Chipty used, the Fact Book data.

Sometimes it had only the Expanded Service charge, but not the B-1 charge. And so that happened one percent of the time. Two percent of the time, the basic-only service, it was a basic-only service charge, it was only the $15 number; for some reason, no Expanded added to it.

And then, finally, 38 percent of them, we just couldn't tell; it was wrong or we couldn't find out a reason.

BY MR. GOLDBERG:

Q It wasn't that you couldn't tell whether it was wrong, you knew it was wrong, you couldn't tell the reason why?

A That's right.

[Page 137]

Q This was looking at all of her prices, not just in Philadelphia, all over the country?

A That's right.

THE COURT: Okay. So, there was -- you've explained the difference with respect to the Fact Book

data that the Doctor was using and the data that you were using?

THE WITNESS: Right.

THE COURT: Okay. What other differences?

MR. GOLDBERG: Well, before we --

THE COURT: Oh, we're not done with that?

MR. GOLDBERG: No.

BY MR. GOLDBERG:

Q Before we finish this, before we finish this, did you criticize Dr. Chipty's use of the Fact Book data?

A I did, yes.

Q Because of these errors?

A Yes.

Q And did she respond to you?

A She did.

Q And what did she say?

A Remember we talked about the random component --

THE COURT: Yes.

THE WITNESS: -- of the regression model? What she said basically was these errors could be thought of or sorted in the random component, they could just be like other random **[Page 138]** others and, don't worry about it, I can still use these prices to get valid outcomes.

BY MR. GOLDBERG:

Q If the errors in fact statistically could be absorbed into the random-error term, if she was right,

then would it mean you don't have to worry about these errors?

A Well, it would still cause me pause, because I want the random-error component of this model to be as small as possible, that's the whole R square argument. And it's going to drive down R square, even if they're random. So, I would still have a problem, but I have a bigger problem if they're non-random, if they're systematic errors.

Q Was Dr. Chipty correct in her characterization of these errors in the Fact Book data as random errors?

A She was not.

Q Is there a way in which you can tell whether the errors are random errors or not?

A There's a statistical test.

Q Did you produce a chart to help explain to the Court how you came to your conclusion about whether these were random errors or not?

A Yes.

(Pause.)

Q I'm showing you, Dr. McClave, what was marked and has been admitted as Plaintiffs' Exhibit 85, for this purpose **[Page 139]** anyway, and we'll cover up the equation for a second.

(Pause.)

Q Can you explain the chart -- what conclusion did you draw, were the Fact Book errors random errors or were they not?

A No, they were systematic.

Q And what is meant when you say they're systematic errors?

A Well, random errors, you know, are errors that fluctuate around zero, that, you know, are plus sometimes and minus sometimes and, on average, are around zero.

Q And if you have random errors will they bias the results of the model?

A If you have what kind of errors?

Q Random errors.

A No, random errors do not bias the results.

Q And is that because they actually fluctuate and cluster around zero, they're above it and they're below it?

A Yes, that's right.

Q Okay. All right. Explain what you found when you actually -- when you actually looked at these errors to determine whether they were random errors.

A So, these Fact Book models, your Honor, were primarily being used, as you might imagine in this case, to compare what's going on in the Philadelphia market to what's going on outside the Philadelphia market. So, the most important **[Page 140]** error or comparison of errors was what's happening in Philadelphia to what's happening outside of Philadelphia. And so, I think I mentioned earlier, that 29 of the prices were Philadelphia prices, the 2008 Philadelphia prices, and --

Q How many of those were in error?

A 100 percent, none of them matched Comcast's own data. And the average error -- and this is

where the non-random part comes in -- was $5.62 minus. In other words, Fact Book, because in part the prices are old in many cases, was $5.62 too low on average.

Q I just want to make -- again, I want to make a record on this, because statisticians do this, the bar is going up, but its actually showing that the price is lower?

A Right, negative.

Q Right. So that's why it's got a parentheses around it, is that correct?

A That's right.

Q All right.

A When we look outside the market, where 89 percent of the prices were in error, the average error was $1.26. And so any comparison of these two markets, using Fact Book, is going to start out with whatever that difference is, four-dollars-and-40-cents-or-so difference, before -- showing Philadelphia prices lower than they really are, compared to **[Page 141]** the so-called benchmark by $4.40, before you ever do the first thing. So, we call that systematic error that's going to bias the result.

Q Let's talk about which way it's going to bias the result, Dr. McClave. If you were seeking to estimate what the extent of the damages were, that is how the big the overcharge was and what the extent of the damages were from anticompetitive conduct, these systematic errors, which way would they bias the results; would they make the damages larger or would they make the damages smaller?

A They would make them smaller by a substantial amount.

Thank you.

(Pause.)

Q We're on a brief detour, or maybe not so brief detour. You were describing -- you were listing the key differences between you and the defendants' expert, Dr. Chipty, with respect to this estimation -- you were both on the same assignment basically, is that not correct?

A That's certainly my understanding as far as damages are concerned, yes.

Q And so you started out by saying that you had a difference with Dr. Chipty about what prices, what dependent prices there should be. Were there other disputes between you and Dr. Chipty about the representation of prices in the dependent variable?

[Page 142]

A Yes.

Q Why don't you explain those to the Court?

A Dr. Chipty, even when she -- well, when she uses the Fact Book prices, obviously they're largely in error, but they are list prices, I mean, that's what they're intended to be. used Comcast list prices. When she, Dr. Chipty, moves to modeling the Comcast prices -- she also does some models with Comcast data, just as I do, but when she moves to those -- to that -- to those models, she doesn't use a list price, she uses a weighted-average price, and so that's a difference between us.

Q And why don't you explain why you chose to use the list price and not the weighted-average price?

A I chose to use the list price for a number of reasons; first of all, it's what a great majority of cus-

tomers pay. Our calculation shows that 80 percent-plus pay list price.

Q In his opening statement, Mr. Shuster criticized you on that account and said that in fact that meant that 20 percent of the customers were not paying the list price; is that accurate?

A Well, no, it's not accurate.

Q Okay. Explain to the Judge why that's not accurate.

A So, for example, your Honor, there are some customers that are on a plan whereby they pay in advance for a number of months. They show up in the system, as far as we can **[Page 143]** tell, and we believe this is right, as a lump sum in one month that covers, say, six or seven months and then, for accounting reasons or whatever, they'll show up as either missing values or zero values in subsequent months. Well, they aren't really paying nothing, it's just that they have already paid. So, it's not fair to say that the numbers only -- and we didn't count those lump-sum payments as list-price payers, we counted -- if you pay monthly for the Expanded Basic Service and you pay list, how frequently does that happen? And the answer is about 80 percent.

Q Did Dr. Chipty, when she was calculating her weighted-average prices, did she count the zeros?

A In -- yes, she did, she --

Q She counted them as prices?

A -- she counted zeros as prices in her most recent report.

Q Now, is it correct that some of the customers do in fact get discounts from discounters?

A It is true.

Q What is your understanding as to what those discounts are from?

A Well, if you look at the Comcast database, the most common terms you'll see in front of a discounted price is, "Limited Promotion," some sort of -- or it will say actually a number of months, three months, six months. It's my understanding that, from both the database and from the **[Page 144]** record, from reading the record in this case, that discounts tend to be temporary and eventually customers are moved back to Rate Card prices or list prices.

Q So, if somebody had a discount in one month, would that mean that they would not have been impacted by a anticompetitive conduct?

A Well, in my opinion, no, for two reasons: One, the discounts are discounts from a list price, which may itself be elevated by the conduct; and, two, it's only temporary, and so that customer is going to be back at some point to -- with all probability to a list price.

Q Any other disagreements between yourself and Dr. Chipty on the representation of prices in the dependent area that you want to talk about?

A Sure. There were also times when in some of her analyses she used something called a motile price, a most-often-paid price and I noticed that -- in some cases, drastically differed from what I was calculating as a motile price, as a most-often-paid price, which was the list price, and I wanted to figure out why. And what I found out was, rather than looking at individual franchises, as I did, she was looking at groups of franchises, which then, for example in

2008, took into account things like the $99 promotion, I think it was a nationwide promotion, to combine --

THE COURT: The Triple?

[Page 145]

THE WITNESS: The Triple Play –

THE COURT: Right.

THE WITNESS: -- yes. So, she would get a $33 price by doing this aggregation when the previous year's list price was 50-something and my list price was still in the 50s, and she's getting 33. And so, to me, you know, that was a sign that she's not getting what I would call a representative list price.

BY MR. GOLDBERG:

Q That price is 2009 or -- was that the year, 2009?

A 2008.

Q Would that price in 2008, it was the motile price, wasn't it?

A Which?

Q The low, $33?

A Well, it was if you aggregated enough franchises together; but, if you looked at the individual franchise level, no, it wasn't.

Q Okay. What other disputes were there between you and Dr. Chipty?

A Certainly, your Honor, and what should be on the right- hand side of the model, the specification, she typically -- well, she has a wide range; she has some variables that have only one variable on

the right-hand side and she has other models that have many more variables than I do. So that, in **[Page 146]** brief, the model specification we differ, we differ --

Q Would it --

A I'm sorry, go ahead.

Q Generally, did you use more variables than she did or fewer variables than she did?

A Generally, I would say my model is using fewer variables.

Q Okay, and well get back to that. What other disputes were there between you and Dr. Chipty, the key disputes?

A Sure. Another one was on how I handled the over-built variable and projected it into the Philadelphia market, we differed in opinion on how that should be done.

Q And we'll talk about that. Were there any other key disputes between you and Dr. Chipty?

A Yes. I think one that Mr. Shuster mentioned on opening, which was something about applying my model to regulated prices and generating damages, as opposed to applying it to the Expanded Basic price.

Q The B-1 model --

A The B-1 model.

Q -- which Mr. Shuster and Dr. Chipty referred to as applying your model to the B-1 price?

A Right.

Q Would you agree with that?

A No, I don't agree with that as my model.

Q Okay, and we'll talk about that also. Let's go back and **[Page 147]** let's start first with the issue between you and Dr. Chipty of more explanatory variables or fewer variables.

A Sure.

Q Why don't you just tell the Judge generally what that dispute is about?

A Well, your Honor, as I mentioned, when I add variables to the model, I'm applying what I think are standard econometric techniques to determine whether they make sense, whether they make sense from a statistical perspective, meaning statistically significant, or they make sense from a theoretical perspective. Are the signs what we expect them to be? And, if they're not passing those tests, then I'm asking myself, should it be in there? Is it somehow correlated with the antitrust behavior that's being compared -- complained of. So, I put it to that test and that's basically called -- it actually has a -- it's a principle in model fitting called the Principle of Parsimony. And what it basically says is, less is better than more if more is not explaining much more or any more logically than less. And it's cited in the literature, it's in one of the econometric texts actually that Dr. Chipty cited. And so there's a balance act here. If you throw a lot of variables in the model that either don't make sense, not statistically significant, you run the risk of, A, adding a lot of noise to the model that doesn't belong there and, B, in an antitrust **[Page 148]** case, you run the risk of putting variables in the model that are actually tainted by or affected by the very behavior that's being challenged.

As you investigated the variables that Dr. Chipty put into her models that you did not, did you find any that were tainted by -- in your estimation, tainted by the conduct that was being challenged?

A Yes.

Q Can you give the Court some examples?

A Well, the example that I think has already been cited even in opening is the population-density variable, that's one that she uses in many of her models. I explained earlier that I looked at it in my model, it had what I considered to be the wrong sign, that's what I wrote in my report; it had statistical problems associated with it as well; but that's certainly a prime example of a variable that I am concerned may well be tainted or correlated with the antitrust behavior, because the clustering tends to take place in highly urbanized, highly populated places, places where population density is great.

Q And was that one of the reasons why you excluded population density from your model?

A It was one of the primary reasons, yes, sir.

Q You actually talked this morning about other reasons that you used -- that folder you -- that you should not have **[Page 149]** included in your model --

A Yes, it has statistical reasons as well, the wrong sign and the extrapolation issue, the issue that -- as it turned out, the benchmark population densities didn't quite cover the population densities in Philadelphia. So, had we used it, we would have been extrapolating into Philadelphia the median-income variable, which I felt was statistically defen-

sible, didn't have that problem and so, to me, was far preferable.

Q And how many different models of hers did Dr. Chipty use for population density?

A I prepared a chart that has at least, I think, 27 models, there may be more, but I think there are at least 27 models of the 51 had population density in it.

(Pause.)

Q Dr. McClave, if you can come from the stand, if you will, please? I'm showing you what is marked and admitted as Plaintiffs' Exhibit 86. When you looked at Dr. Chipty's models that did use the population density as a variable, had she solved the statistical issues that guided you to exclude the variable from your specification?

A No.

Q If you will explain what Exhibit 86 shows you?

A Right. All right. Your Honor, first of all, the bars that are mostly white, enclosed by blue, those are all models **[Page 150]** that Dr. Chipty specified in which the weight or the coefficient of the population-density variable didn't pass the T test, was not statistically significant. So, it's as if I put population density here, put the weight in, but when I test to see is it statistically significantly different than zero, the answer is no. And so, from a statistical perspective, we would say that variable is not -- there's no evidence that that variable is contributing. So that happened 70 percent of the time, 19 out of 27.

Q And now are those all represented on this chart?

A That's this count right here.

Q And they're all negative, but not statistically significant?

A Every one is not statistically significant. In eight cases, eight of the models, it was statistically significant, but inconsistent. In three models, the three green -- shown by green here, the weight was positive and statistically significant. In five of her models, the weight was negative and statistically significant.

Q Now, let's talk -- stop for a second. From an economic perspective, what would be the sign that you would expect, what would be the expected relationship between population density and price of the Expanded Basic?

A My expectation, all other things equal, was to find a negative relationship, as I explained earlier, in that -- **[Page 151]** both from a -- almost a common-sense point of view and from reading the FCC submissions and so on, the concept is, if I am running a cable service in a relatively densely populated place, I've got more people to spread my costs over and so, on average, I'm going to have lower costs and, therefore, if price is following cost, I would expect price to be, on average, lower.

Q So, you would expect there then to be a negative relationship as to -- with respect to cost?

A That's right. But what this leaves me thinking is, what is it, positive, negative or null? And so, from my perspective -- and there's been a lot of criticism of me for not having this variable in the model -- to me, the evidence provided by fitting a whole host of models confirms my concern that this variable may well be tainted and may not even be important

as far as price is concerned, because 70 percent of the time it doesn't even show up as statistically significant.

Q Thank you, Dr. McClave.

THE COURT: There was criticism that I thought I saw in Dr. Chipty's reports. With respect to your approach to the number of units, household as compared to individuals, do you remember that?

THE WITNESS: Your Honor, I'm remembering some estimates that needed to be made in some areas as of numbers of **[Page 152]** subscribers, I don't know if that's maybe what you're thinking about?

THE COURT: It's number of subscribers versus number of households.

THE WITNESS: Right.

THE COURT: That your formula never accounted for that and, therefore, is misleading.

THE WITNESS: I'm not on total board with exactly what criticism that is.

THE COURT: Okay.

THE WITNESS: I do know that, for example, when we're measuring market share, there are basically two ways to do it, one is I can take all cable subscribers and find out what share Comcast has, and the other is I can take total households that could have cable. And it's important to be consistent, I believe both are useful or possible, it's important to be consistent, and that may have been a source of some dispute.

THE COURT: Okay.

THE WITNESS: We have typically --

THE COURT: Maybe that was it.

THE WITNESS: -- used households, but --

THE COURT: Yes.

MR. SHUSTER: I believe that was a difference of opinion between Drs. Chipty and Williams –

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THE COURT: Oh, okay. Thank you.

MR. SHUSTER: -- on selecting -- whether you select number of households or homes passed for cluster size.

THE COURT: Thank you, Mr. Shuster. Yes, that was it. Okay, it doesn't involve you.

THE WITNESS: Wow, thank you, Mr. Shuster.

(Laughter.)

MR. GOLDBERG: We may be out of here earlier than we . . .

(Laughter.)

BY MR. GOLDBERG:

Q Let's turn then to -- is there anything else that you want to say about this dispute between you and Dr. Chipty about more variables versus fewer variables?

A No. I would just say I do follow the principle of parsimony, I believe in it. Simple explanations that are reliable are better than complex ones that are not.

THE COURT: I mean, what's its level of acceptance in your community of professionals?

MR. GOLDBERG: What levels --

THE WITNESS: The principle of parsimony?

MR. GOLDBERG: -- of parsimony?

THE WITNESS: Certainly amongst statisticians, I can't speak for economists because I'm not one, but amongst statisticians, certainly I think it's pretty widely accepted **[Page 154]** that the model ought to make sense and -- and factors in the model ought to be statistically significant. And in fact, your Honor, if you'll indulge me, since you have asked that, I've got a quote that I put in my report and I can give you the cite, but this is from a book by Gujarati, G-u-j-a-r-a-t-i, called "Basic Econometrics," which is cited by Dr. Chipty and one of the reasons I went to look at it. I wasn't particularly familiar with this, but this is the quote: "The Alcomb's (ph.) Razor" -- that's what -- Alcomb was the individual that first came up with this principle of parsimony -- "Alcomb's Razor or the principle of parsimony states that a model be kept as simple as possible or, as Economist Milton Freedman would say," quote, "'a hypothesis parent model is important if it explains much by little,'" end quote.

What this means is that one should introduce in the model a few key variables that capture the essence of the phenomenon under study and relegate all minor and random influences to the to the error term. That's basically the principle I'm following.

BY MR. GOLDBERG:

Q In your books, do you teach the principle of parsimony?

A Yes, in the sense -- I may not call it Alcomb's razor, but in the sense that we teach students it's important to look at all the statistical output, as you called it earlier, **[Page 155]** and be sure that the model is passing the tests, that you don't have varia-

bles in there like that is shown on the board there that are largely statistically insignificant.

Q Did you look at other variables to include on the right-hand side of the equal side other than just the ones you did include?

A We considered a whole host of variables, including population density, sure.

Q And did you -- and with the -- let's take the population density.

A Okay.

Q Did you run models with population density?

A I did, particularly after it was criticized so much that I didn't use it, I wanted to see what happens if I do put it in, even though I don't think it ought to be in there.

Q And what happened to the damages?

A They went down a little.

Q Was that -- were you surprised --

A Well, we're talking about hundreds of millions of dollars here, so I shouldn't say a little.

Q Don't say a little.

A They went down.

Q Were you surprised that they went down?

A No.

Q Why not?

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A Because it has the wrong sign in the model and is likely to be tainted by and conflated with the anticompetitive behavior that's being complained of.

Q If in fact a variable is tainted by the anticompetitive behavior, would it be your position that that would then have an effect of reducing damages?

A Sure. Every variable you add in the model that is somehow affected by the anticompetitive behavior is going to reduce the overcharge.

Q So, did you -- when you talk about the principle of parsimony, did you exclude variables that were statistically significance, did have the right sign, you know, had a good economic explanation, did a good job, were there any that you excluded and you said, I'm going to exclude them just because I want to keep it down to less than ten variables?

A No, sir. If we found such variables, they would be in there.

THE COURT: Mr. Goldberg, how much more time do you need for direct examination? I'm not rushing you, I'm just hurrying you.

(Laughter.)

MR. GOLDBERG: I will hurry along, your Honor.

THE COURT: Thank you.

MR. GOLDBERG: Great.

BY MR. GOLDBERG:

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Let's move on to a criticism about over-building.

A Okay.

Q Explain to the Judge what the criticism of -- what you did with respect to the over-building variable and why.

A So, your Honor, I understood one of the complaints to be that over-building had been constrained by the anticompetitive behavior. And so when I took this model that's up on the board here, this equation, and applied it to Philadelphia, I assumed that five counties would have had over-building to some extent, and I based that on RCN, the over-builder that is in Delaware County or at least has been at some point, had filed notices of intent, applications and so forth, to enter five counties, I believe it's Delaware, Philadelphia County, Bucks, Montgomery and Chester. And so the criticism was -- well, sort of, how do you know? What makes you think that would have happened? And my answer to that question was, well, I don't know but, if the plaintiffs are right, the reason I don't know is because of the anticompetitive behavior, and so I have to make some estimate. Plaintiffs are asking me, what are the damages if the behavior hadn't occurred, and so that's the assumption that I made.

Q Would it have been a correct way to specify this model to just have your over-builder variables show -- what does it show when there's over-building, one or zero?

[Page 158]

A One.

Q Would it have been correct to just have the over-builder variable show one just in the Delaware County where they were in fact over-building?

A Well, again, I think -- you know, ultimately that's for the trier of fact, but in my opinion, if the plaintiffs are right, no. I mean, that's not much of a constraint since they are in Delaware County. But, again, it's an assumption on my part to measure the over -- the effect of overbuilding.

Q Let's turn to -- anything else about the over-builder variable?

A Only one other thing, your Honor, and that is, in her first report, Dr. Chipty proposed a model that estimated the probability of over-building in various counties in the Philadelphia market. And I looked at that model, I don't necessarily agree with it, but it showed that it was more likely than not, greater than a 50-percent chance, that there would be over-building not in just five counties but in nine counties. So, I, again, took some solace in that model, having estimated more likely than not in a greater number of counties than I'm assuming, which is fine.

THE COURT: What were the total number of counties you took into consideration again?

THE WITNESS: Five.

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THE COURT: Five. Five for over-building?

THE WITNESS: Five for over-building.

THE COURT: How about overall?

THE WITNESS: 16.

THE COURT: 16.

THE WITNESS: So, there are 11 --

THE COURT: So, five of the 16 were over-building counties?

THE WITNESS: According to my assumption, yes, and that's what drives that -- part of that damage number.

BY MR. GOLDBERG:

Let's turn to the B-1 model.

A Okay.

Q Explain to the Judge what you understand Dr. Chipty is doing in applying what she calls your model to -- not to Expanded Basic prices, but to the regulated Basic prices?

A May I use this equation?

Q You may.

THE WITNESS: May I approach, your Honor?

THE COURT: Yes, sure.

THE WITNESS: So, your Honor, what she did was she takes the left-hand side of this and, instead of plugging in Expanded Basic price, she plugs in that B-1 regulated price, and of course doesn't keep -- and then puts it in the computer. And –

[Page 160]

BY MR. GOLDBERG:

Q Does she change anything else in your model?

A She doesn't change the variables at all, but of course all these weights go haywire. I mean, it's not -- this model was developed for a specific price, namely that standard price on that rate sheet. Those regulated prices, if you're going to build a model for regulated price, this is not the set of variables that you're going to use. You'd have something about regulation in there, I would assume. So, obviously -- and

I don't want to get too carried away here -- I took umbrage at the fact of calling it my model, because as soon as you change the dependent variable the specification of the model is going to change. It's like saying, if I have a good model for the price of gasoline, it ought to work for oil. It doesn't make sense.

Q Let me ask you a couple questions. Does this Exhibit 51, written in an equation form, does this reflect your model?

A It does.

Q As part of the specification, is the dependent variable part of that specification of your model?

A I would call it the most important part.

Q So, if you change that most important part of the specification, would it be your model?

A Not at all.

Q Let me ask it in a different way –

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MR. GOLDBERG: -- and I'm not going to belabor this, your Honor, but I do want to make a record, since it was important enough to mention in opening argument.

BY MR. GOLDBERG:

Q If I had called you up in this case and said, Dr. McClave, I don't want you to estimate damages for Enhanced Basic cable service, I want you to estimate damages, let's say, for an Internet connection, would you expect that your model would have all these particular specifications on the right-hand side?

A No.

Q If you used -- just arbitrarily used these particular specifications on the right-hand side, would you expect it to do a good job, a reliable job in saying what the price for a connection to cable would be?

A No, I would expect to get nonsense.

MR. KORPUS: Objection, your Honor. I think we all know the point he is getting at.

THE COURT: The objection is sustained.

MR. GOLDBERG: All right, great.

THE COURT: So, we're off that topic.

BY MR. GOLDBERG:

We've now gone through what you identified, Dr. McClave, as the key disputes between you and Dr. Chipty. Were there other disputes between you and Dr. Chipty -- I'm going to ask **[Page 162]** you, did she criticize you for other reasons?

A Sure.

Q A lot of them?

A Most of them would probably fall under the four categories, but, yeah, there were a number of others.

Did you -- and were not going to go through all of them, but did you prepare a chart to help explain to the Court generally these other reasons, these other principles?

A Yes, I did.

(Pause.)

I'm showing you what we've marked and has been admitted as Exhibit 82, Dr. McClave. Can you come down from the stand, will you show the Court --

MR. GOLDBERG: -- this is towards the end, your Honor, I'm hurrying up here and -- do you have it, your Honor?

THE COURT: I can see it, go ahead.

MR. GOLDBERG: But, if your Honor will allow me, I'll be glad to get it for you.

BY MR. GOLDBERG:

Q But explain to Judge Padova what that --

THE COURT: Yes, I have it. Good. All right.

BY MR. GOLDBERG:

Q Go ahead.

A So, this is a bar chart that shows, your Honor, as the **[Page 163]** first one in the far-left here, the original model from my April 10 report -- or actually May 4 report -- of $876 million. And what I'm doing is addressing, you know, each of a number of criticisms. For example, taking the very first one. One of the things that we do in statistics is we look for outliers, influential observations that might not make sense or that might be having too much influence. I always, it's my practice to screen out outliers and not let them have that kind of effect. Dr. Chipty, in her models, left outliers in for the most part.

THE COURT: Give me an illustration of an outlier.

THE WITNESS: So, I've got a price in the model that is a basic price, $16, that for one reason or another is showing up as an Expanded Basic price. And so, when I fit the model, it shows that it's more than

two standard deviations away from what I would predict it to be. And so statisticians say, when that happens, see what happens when you take them out, because they may be having a big influence on the model. Those are outliers.

BY MR. GOLDBERG:

Q And so does Dr. Chipty criticize you because you had screened out outliers?

A There wasn't a direct criticism, it was just she didn't do it. And so I wanted to see what had happened to my model if I had left them in and it actually would have caused me to **[Page 164]** report higher damages. I also thought that this was an answer to the criticism that all I ever did was make decisions that increased damages; that's not true, there are a number of bars on here that have higher damages. And, as you say, I won't go through these all, unless your Honor wants me to. I will say that the very lowest one, the green bar in the middle here --

Q The one that says, "Chipty average prices, all Chipty demographics"?

A Right. That's the one that probably contains sort of all my criticisms or what I think is a worst-case situation of her model. She's using average instead of list and she's throwing demographic variables in there, whether they're significant or not, whether they -- for example, there is a variable in that model, the percent of people who have less than a 30-mile -- no, 30-minute commute; there is a variable in there, percent African-American; there is a variable in there, percent Spanish-speaking. I don't know what the sense of those in, but I put them all in and just to see are there still damages estimated. And, obviously, you can make damages go down by

throwing all that stuff in there, a number of them are probably related to the complained-of behavior, and as soon as she starts to correct it, your Honor -- so, the next one I use list price, and it's the yellow bar, then I take out –

[Page 165]

Q What happens to damages when you make that correction?

A It goes up.

Q All right.

A Then in the purple bar --

MR. KORPUS: Excuse me, your Honor, I have an objection, I think I have an objection, I think I may have misunderstood what this demonstrative was when it was provided to us. I thought that this was a summary of studies that were in the reports that had been provided to us before. If this is in fact something showing new runs and new models that Dr. McClave ran as centipede checks, which he has not provided to us and are not contained in his reports, then I have an objection to the demonstrative.

BY MR. GOLDBERG:

Q Are any of these new specifications, Dr. McClave, or are they just tests of the specifications that Dr. Chipty ran?

MR. KORPUS: No, but that's all my question, are those tests, these models, included in the reports that have been filed in this litigation today?

THE WITNESS: I believe they all have been, yes, I think they have all been --

THE COURT: In the rebuttal reports?

THE WITNESS: Yes, and -- I mean, the four reports. So, we're covering a lot of ground here but, yes.

MR. KORPUS: Then I have no objection, your Honor.

[Page 166]

THE COURT: Okay, fine. I mean, if you find -- you know, tonight take a good, close look, if you find that that's not the case, we can reopen the issue and entertain an application.

MR. GOLDBERG: All right, your Honor.

THE WITNESS: Well, just to finish the thought. So, the green bar, as I said, is throwing all this stuff in the model, then you start to do some statistics, list price instead of average price. Take any variables out that you're having to use extrapolation, which is what we call a problem, a statistical problem, and then eliminate things that are collinear, meaning correlated with one another to a very high degree and possibly to the anticompetitive behavior, and which are also nonsignificant, not statistically significant, then you're back to a level that's higher than the number that I assumed.

So, when you take -- this is -- your Honor, earlier when I talked about the robustness of the model, when you take this as a whole -- I think I've got another exhibit that shows a comparison of my model to sort of the average of all of these --

MR. GOLDBERG: This is a chart that I left on the top of your pile, your Honor, Exhibit 83.

(Pause.)

THE WITNESS: So, again, this is the 876 million **[Page 167]** from my model, the model that's right

here, and this is the median of the 50th percentile of all those other bars, the colorful bars on the previous chart, and you can see it's within one or two percent of (inaudible).

BY MR. GOLDBERG:

Q What does that show you, Dr. McClave?

A To me, it was a test of the robustness of my estimate and certainly evidence that it wasn't my objective to choose models or variables or make decisions based on the size of damages, there are some ways of -- that you can use, I think, incorrectly to make them higher and there are some ways you can use incorrectly to make them lower.

THE COURT: So, then is it fair to say, Doctor -- or let me put it this way, not is it fair to say -- is it a fair understanding of mine with respect to what you're saying, is it a fair understanding that, using each of Dr. Chipty's models, the differences that result are quantitative differences and that each model that she has suggested indicates antitrust impact, common antitrust impact across the entire class?

THE WITNESS: The answer is, in general, yes. I'm sure she's going to testify to the contrary, because there are some things that I call novel approaches to damages whereby she has claimed that she has got zero or less. But, in my view, if you stay within the bounds of, you know, well-**[Page 168]** accepted methodology, even if you over-specify the model and make some of these other mistakes, yes, you're going to find some level of common impact, in my view.

BY MR. GOLDBERG:

Q She does specify models that show no damages, does she not?

A Yes.

Q So, those would not support common impact.

THE COURT: Thank you. Okay.

BY MR. GOLDBERG:

Q She does specify some models that show negative damages, does she not?

THE COURT: Okay, I thought we were looking at all the models.

MR. GOLDBERG: No, those are not, those are not all of the models. There were 51 --

THE COURT: P-82 doesn't contain all of her models?

MR. GOLDBERG: It does not, that's right, your Honor.

If you take the stand, I have a couple of areas to conclude, and then I'll pass the witness.

BY MR. GOLDBERG:

Q There are a couple of things that I want to cover just at the end, Dr. McClave. You heard in his opening argument Mr. Shuster say that your multiple-regression model in this case **[Page 169]** was unrelated to the plaintiffs' claims --

A I did.

Q -- did you hear that?

A Yes.

Q Do you agree?

A No.

Q Explain to the Court why your model is in fact related to the plaintiffs' claims and how.

A It's related to the plaintiffs' claims, first, because I selected a benchmark market that was free of what I understood to be the effect -- the claimed effects of the behavior; second, it's related to the claims in that I tried to be extremely careful in specifying this equation not to include variables that might be tainted by that behavior. So, in fact, in my opinion, this directly addresses the issue of impact, assuming that the plaintiffs are correct in their complaint of the behavior.

Q Mr. Shuster criticized your unit of observation. What did you use as the unit of observation?

A County.

Q County?

A Well, I should say, I started at the franchise level with prices, but I ultimately aggregated up to county.

Q Explain to the Court why -- and you heard Mr. Shuster say Dr. McClave didn't use the DMA as the unit of observation?

[Page 170]

A Right.

Q Why didn't you use the DMA as the unit of observation?

A Because, in my view, aggregation to that level, from a statistical perspective, was way too high a level of aggregation. As he mentioned, there are only 210, I think, or -- and 60-some of those are clustered. I wanted a level of aggregation where I could

see some variation. If you just look at the franchise level, neighboring franchises are almost all the same price. By the time you get to the county level, you do start to see some variability. And so, from a statistical perspective, it's important to get to a level where there's going to start to be some variability, because what the model is doing up here is measuring the reason for price variability.

Q So, is it --

A Secondly -- I'm sorry.

Q Is it correct that, in order to have a good multiple-regression model, from a statistical point of view, you need to have some variability in your observed price?

A That's exactly right.

Q Okay. Go ahead.

A And, secondly, had I gone to the DMA level, I would have had a single number per year for the Philadelphia DMA; maybe that's okay, but plaintiffs' counsel said, look, you know, we want to know, can you say geographically as you move through **[Page 171]** the class that the impact is everywhere or not? And the only way I could test that was going to something lower than the DMA level, which I chose as the county level.

Q All right. Now, you understand in this case after listening to the opening arguments that there is a dispute as to market definition?

A Yes.

Q You're offering no opinions on market definition, are you?

A I am offering no opinions on the market.

Q Thank goodness. And is your model in any way dependent on market definition?

A No.

Q No matter -- if the Judge were to make a decision at this stage of the proceedings on market definition, would it change the results of your model in any way?

A No, I don't believe so.

Q Would it change your opinion in any way as to what the proper estimation of damages is in this case?

A No.

Q Would it change your opinion in any way that your model shows common impact across the class?

A It would not.

Q Thank you.

MR. GOLDBERG: I pass the witness, your Honor.

[Page 172]

THE COURT: Do you want a ten-minute break or should we go forward?

MR. KORPUS: That would be helpful, your Honor.

THE COURT: A ten-minute break. Okay, well take a ten-minute recess.

(Recess taken from 3:09 p.m. until 3:23 p.m.)

MR. GOLDBERG: Your Honor admitted all of them at the beginning, but there are actually two

that I did not use, so I believe they ought then to be withdrawn.

THE COURT: They've all been admitted, so -- if they're in the folder, they've been admitted.

MR. KORPUS: I think we're withdrawing a couple.

THE COURT: Oh, you're withdrawing a couple?

MR. GOLDBERG: I will withdraw them.

THE COURT: Which ones are they?

MR. GOLDBERG: 87 and 89.

THE COURT: Very well. 87 and 89 are withdrawn and stricken from the record.

MR. SHUSTER: Your Honor, one other quick housekeeping matter, if I may?

THE COURT: Sure.

MR. SHUSTER: We have Mr. Burke scheduled to testify. To insure we get him on, because I know tomorrow he's available, counsel have agreed if it's okay with the Court –

[Page 173]

THE COURT: It sure is.

MR. SHUSTER: -- to have him come on at 1:30 even if we --

THE COURT: We'll accommodate him completely. You just tell me what time and we'll accommodate him.

MR. SHUSTER: Thank you. 1:30 is the agreement --

THE COURT: Very well.

MR. SHUSTER: I'll go for that. Thank you.

MR. KORPUS: And, your Honor, we've provided the witness and the Court with a binder of documents that we may show to Dr. McClave.

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. KORPUS:

Q Good afternoon, Dr. McClave.

A Good afternoon, Mr. Korpus.

Q Now, as you testified, your assignment in this case was to estimate the amount by which plaintiffs and the other class members were overcharged by the alleged anticompetitive conduct, right?

A Yes, if any.

Q And your work is predicated on the assumption that Comcast is found liable for competitive conduct as alleged by plaintiffs, right?

A For anti-competitive conduct.

[Page 174]

Q For anti-competitive conduct, correct.

A Yes.

Q And what you've done is you've taken the alleged anticompetitive conduct as a whole and evaluated the impact from that conduct, right?

A That's true.

Q So that would be the allegations concerning the transactions and clustering, the allegations concerning DBS and the allegations concerning RCN, right?

A Yes, that's right. RCN and overbuilding in general the way I --

Q Right. You take them all as a whole.

A Yes.

Q Your model, you did not attempt in your model, for example, to show just an impact on the class from the denial of Sportsnet to DBS just in isolation. You did not try to do that, right?

A That's correct.

Q And also in your model you did not try to show in isolation the impact on the class from just the allegations that are directed to RCN, right?

A I did not.

Q And you did not try to show the impact on the class from just the allegations related to clustering on their own, right?

[Page 175]

A That's correct.

Q Okay. You took them all as a whole. So let's go back and talk about what you did do, and I know you testified about some of this, but I want to drill down in a little bit more detail.

In order to assess plaintiff's allegation that Comcast's alleged anti-competitive behavior resulted in plaintiff's paying higher prices, you had to estimate a benchmark price against which you compared prices in Philadelphia, right?

A Correct.

Q And to find those benchmark prices, you took Comcast prices at a franchise level throughout the US, right?

A That's what we started with.

Q That's what you started with, the documents that Comcast gave you showed what are you charging in franchises in the US.

A Yes.

Q And that's how Comcast keeps its pricing data, by franchise?

A Yes.

Q And then you aggregated them up to the county level, right?

A Yes.

Q And you took the mode for each franchise area and then **[Page 176]** you did a weighted average to get the weighted average price in the county, right?

A Generally speaking, that's right.

Q Generally speaking. I know the screens and we'll talk about that later.

A Okay. What we try to do is take the list price, which was typically the mode --

Q Right.

A -- and then we did what you said.

Q Right. You took the list price for each franchise and then you get the weighted average and you get a price for the county.

A Right.

Q And then you compare the prices in your county in the benchmark counties after applying some screens that we'll talk about in a second to prices in the Philadelphia counties, right?

A Well, as long as you're using comparing in a very general sense, I would agree that comparing is first developing a multiple regression model for the prices and then doing the comparison.

Q That's right. But your multiple regression model is a way to compare the prices that are being charged in the counties in Philadelphia with prices charged in those counties as you calculated them after applying certain **[Page 177]** screens, right?

A Certain screens and certain adjustments.

Q That's right. So you compared county to county at the end of the day?

A No. I don't believe that that's what I do. I'm not taking any given county in the benchmark and saying let's compare that to Bucks County. I'm saying let's take the collection of counties, let's develop a model that explains prices best we can without confounding it with the alleged anti-competitive behavior, and then take that model, that equation and estimate but-for prices. But that's far different than taking a county's price and the benchmark and comparing it to a county's price in Philadelphia.

Q Right. But your analysis is done based on prices charged at the county level, not an average for the whole DMA.

A That's right.

Q Okay. That's the only point I'm trying to make.

A Okay. Then we're in agreement.

Q You did not compare average price in the Philadelphia DMA against average price in other DMAs, right?

A That's right.

Q Instead you look through the DMA and you take out your benchmark sample counties that meet the certain screens, and those are the counties that you compare to counties in Philadelphia?

[Page 178]

A Ultimately that's true, again using comparison in the sense of applying a model to do so.

Q Understood. Okay.

So let's go now to how you select those counties, those benchmarks. Benchmark prices are also known as but-for prices, right?

A Yes.

Q And the idea is to find prices that are unaffected by the alleged anti-competitive conduct, right?

A Yes.

Q So you're trying to find counties that reflect characteristics that one would find absent Comcast's alleged anti-competitive conduct, right?

A Yes. Counties that are free of that conduct or the effects of that conduct.

Q That's right. Counties that reflect -- this comes straight out of your report. Counties that reflect characteristics that one would find absent Comcast's anticompetitive conduct. Do you have a problem with that characterization?

A I don't. I was just expanding on it a little.

Q Okay. And in order to find those counties that you say are free from the alleged or show the same characteristics as counties that are free from alleged anti-competitive conduct, you applied two

screens: The DBS penetration screen and the **[Page 179]** county penetration screen.

A What was the second one?

Q County penetration. County penetration.

A County penetration? I don't know what that is.

Q The Comcast penetration.

A The market share penetration.

Q Market share penetration, we can call it that. I thought you called it county penetration. We can call it Comcast.

A I don't think I ever called it county penetration.

Q Okay, that's fine. So again I want to just explain what we're talking about. You have your sample of Comcast prices at franchise level, right? You aggregated them up to the county level. But you didn't use all of those prices. You only used prices that survived these two screens, right?

A You're talking now at the county level?

Q Yeah, in your benchmark sample.

A Yes. Once it was at the county level, then I looked for counties that satisfied the two screens.

Q Okay. Well, let's deal with the DBS screen first. Now, you used figures that you had available on ADS penetration in the DMA.

MR. KORPUS: And I'm sorry for all the acronyms. I'll explain them in a second, your Honor.

BY MR. KORPUS:

But that's what you did, right?

[Page 180]

A That's what I did.

Q And ADS is alternative delivery system.

A Yes.

Q It includes DBS.

A Yes.

Q You didn't have DBS figures so you took ADS as a proxy for that.

A That's correct.

Q Okay. And you screened out all counties that belonged to DMA's where the ADS penetration was below the national median, right?

A That's right.

Q So if a county in your sample belonged to a DMA where the ADS, your proxy for DBS penetration was at or above the national medium, it's in. But if it's below, then you don't look at that. You put it to one side.

A That's right.

Q Now, for the counties that you dropped, you don't know whether their ADS penetration was below the national median at the county level, right?

A I believe that's right. It's only available at the DMA level.

Q Right. So all you know is that those counties belonged to a larger area, a DMA, where on average in the DMA the ADS penetration is below the national median.

[Page 181]

A Correct.

Q But it's possible that the individual counties that you dropped from your analysis have penetration that was above the national median, right?

A Yes, that's possible.

Q But you dropped them anyway, right?

A Well, I dropped them because I don't know what they are, yes.

Q Right.

A That's right.

Q So even though you didn't have the information you needed at a county level, instead of doing a DMA level analysis, you still drilled down to the county and then you made certain assumptions that essentially the county level penetration would be the same as the DMA level penetration.

A I used the DMA level penetration as a proxy for county since I did not have county, that's right.

Q Okay. Now, I think either your last answer or your second to last answer to Mr. Goldberg was that your analysis here is not affected at all by the geographic market at issue in the case. Do you remember that discussion?

A Right. I did not explicitly consider the geographic market or any opinions on it in deriving my damages estimate, that's right.

Q But don't you think if the Court here were to rule that **[Page 182]** geographic market was a franchise area or a county, then wouldn't you need to know whether the particular counties of franchise

areas that you dropped out of your benchmark sample satisfied the test?

A No, sir. I don't believe so. The goal is not to -- is not to identify with 100 percent assurance each and every place that might be free of anti-competitive behavior or the effects thereof. The goal is to get a large sample of places that are likely to be free of that behavior. It's certainly my experience that one can never find a perfect benchmark.

Q But it's good enough in your opinion to just drop those counties even though you don't know the DMA penetration, even if the Court were to say that the county is the appropriate geographic market.

A Again, in my experience as a damages expert, the definition of geographic market does not play a role.

Q Okay. Now, you yourself did not study how DBS penetration would be affected if Comcast made Sportsnet Philadelphia available to DBS, right?

A I did no such study, no.

Q You conducted no study showing that if only DBS operators had Comcast Sportsnet, the penetration would be at or above the national average?

A I have no such study.

Q Okay. You actually think it's possible that in the but-**[Page 183]** for world ADS penetration in the DMA could be higher than it is today but below the national average, right?

A It's possible.

Q But still you exclude all counties that belong to a DMA where penetration was below the national average, right?

A For the benchmark I did that, that's right.

Q Okay. And you have not seen any opinion from plaintiff's liability experts, Dr. Singer or Dr. Williams, that satellite penetration would have been at or above the national average if the satellite operators had Philadelphia Sportsnet, right?

A Well, no, I haven't seen anything that explicit. I think they both have the opinion I believe that it would have been significantly higher than it is.

Q But they don't say it would be higher than the national average or at the national average, right?

A I haven't seen that one way or the other. I don't know whether they've compared it to that.

Q So they're the liability experts and they did not make the assumption, right?

A I don't know.

Q Okay.

A As far as I know.

Q Okay. And in fact Dr. Singer in an article with Dr. Seidek (ph) in 2005 opined that in 2005 DBS penetration Philadelphia would have been six percent higher if they had **[Page 184]** Comcast Sportsnet. Are you familiar with that number, the six percent number?

A I think I've seen it in some of the pleadings.

Q Okay. Well, let's look at your report on page 7.

Can we just blow up the table there, table 1?

Now, table 1 of your report shows that in 2005 actual penetration in Philadelphia of ADS was 9.4 percent. Do you see that?

A I do.

Q And the average, the national median rather was 22.1 percent, right?

A In Comcast markets, that's right.

Q So for purposes of selecting a benchmark, if a county belonged to a DMA where the DBS penetration was below 22.1 percent, you did not include it in your benchmark; right?

A That's right.

Q But if you add the six percent from Dr. Singer's study to 9.4 percent, you get 15.4 percent, right?

A Yes.

Q And that's what Singer and Seidek could predict, right?

A You'd have to ask them. I don't know. I'm not familiar with that model.

Q Okay. Well, if you added 6 percent you would get 15.4 and you would still exclude from your benchmark sample a county that belonged to a DMA which had a penetration of 15.4 [**Page 185**] percent in 2005, right?

A Those did not make the cut. I looked at the top half.

Q Yes. Even though that might be consistent with what Dr. Singer's analysis might show?

A It may be. I don't know.

Q Okay. You just don't know.

Now, you excluded all counties belonging to a DMA where the ADS penetration was lower for the national medium for any reason, right? You just looked at the objective number, right?

A Yes. I was looking for the top half of the DMAs where DBS penetration was less likely to be constrained than it was in this market. That was the goal.

Q Not just in situations where the DBS operators did not have regional sports networks, right?

A No, I did not look for the reason behind the DBS penetration numbers.

Q Right. You attempted to -- you did not attempt to find why DBS penetration was high.

A That's right.

Q Or why it was low?

A That's also right.

Q And in fact many of the counties that you excluded from your benchmark sample belonged to DMAs where the satellite operators do have regional sports, right?

[Page 186]

A That may be true. Since I didn't investigate it, I don't know.

Q You don't know?

A I would assume that to be true.

Q Do you know that in the vast majority of the United States the satellite operators have access to regional sports?

A Again, it's not an area that I've studied, but I've certainly read the record and that would be my understanding.

Q Okay. But that wasn't important to you.

A No, not in trying to find places that didn't look like Philadelphia with regard to DBS penetration, it wasn't.

Q Did you look historically at what a DBS penetration was in those counties?

A Well, if you mean historically before 2003 --

Q Yes.

A -- or before 2003. No. I looked at the same period that I was modeling, 2003 to 2008.

Q So it's possible that DBS had high penetration from the beginning of time, right?

A In some of the benchmark --

Q In the benchmark counties, yeah.

A Sure.

Q And it's possible that that's because they're more rural, right?

[Page 187]

A In the realm of anything being possible, sure. But we know that the benchmark includes a lot more than just rural.

Q But you know that there is a relationship between rural areas and DBS penetration, right? Or is that not something you know either?

A I -- yes. I understand that there are places that cable doesn't reach and DBS penetration can be higher. We know that the counties that are in the

benchmark have Comcast present, so we know that there is cable in all of these counties.

Q We know there's Comcast presence in the DMA, right?

A No, sir. The Comcast presence is measured at the county level.

Q Right, we know there's Comcast present in the county, but we don't know if it's available throughout the county, right?

A That's true.

Q So it's possible that there's some Comcast presence somewhere in the county, but the majority of the county does not have Comcast presence?

A It's possible.

Q But you did not look into that, right? You did not look to see whether Comcast or cable was available throughout the counties.

A That's true.

Q Now, finally the way you do it in your analysis, and I **[Page 188]** think its shown even by your regression, is you look at these counties and you pick out your benchmark sample year by year, right?

A Each year I look across the country for counties that satisfy the two criteria.

Q So it's possible and in fact happens fairly frequently in your sample that a county might be in the benchmark sample one year, out the next year, in one year, out the next year, right?

A Well, I don't know how often that happens, but it's certainly possible that a county will be in there for part of the period and not another part.

Q Okay. So you have counties coming in and out of the sample set?

A Yes, there's no -- right.

Q Right. And by the way, what about the counties in the Philadelphia DMA? Did you have DBS penetration data for the counties in the Philadelphia DMA?

A I think I just had DMA-wide. That's what I recall.

Q Well, you understand that DBS penetration varies across the cluster here. You understand that?

A Sure, I do.

Q And you've seen some maps and statements to that effect in the record, right?

A I've certainly seen statements to -- I don't know how **[Page 189]** much data I've seen to that effect, but I've seen statements to that effect.

Q Is it possible that some of the counties in the Philadelphia DMA in fact have penetration that's above the national median?

A Certainly it's possible.

Q But you don't know?

A I do not have numbers at the county level.

Q You didn't look?

A Oh, I looked for numbers at the county level, absolutely.

Q Oh, you did.

A Yes.

Q And you couldn't find any?

A I did not see numbers at the county level that I could utilize.

Q Okay. Now, let's move on to your second screen, the county -- what do you want to call it, Comcast penetration screen, is that a good name for it? The Comcast market share screen?

A Sure.

Q I want to be clear again what you did here. You computed Comcast percentage of housing units of the Philadelphia DMA at the beginning of the class period, right?

A That's one of the things I looked at, yes.

Q Yeah. And you said at the beginning of the class period **[Page 190]** Comcast had 20 percent of houses in the DMA.

A In the Philadelphia cluster?

Q Yes.

A Yes.

Q Okay. So that was your starting point. And then you say in your report that Comcast's percentage in the DMA increased significantly as a result of this challenge swap and acquisitions, right?

A Right.

Q And you say in your report that Comcast's percentage of housing units in the whole DMA now, so now we're talking the whole DMA -- where shall we put the map, Exhibit 2 to the Chipty report.

It's in the Chipty report. You actually have it there, Dr. McClave, as Exhibit 6 if you want to look at it. In Tab 6.

A Oh, thank you.

Q And can you just blow up the blue, dark blue, just blow it up a little bit?

So you said in your report that Comcast's percentage over the class period increased from 20 percent to 60 percent, right?

A Yes.

Q Okay. And you include in your benchmark only counties where Comcast has penetration below 40 percent, because you **[Page 191]** say that's the midpoint between 20 percent and 60 percent.

A Yes.

Q Okay. But -- and you say in your report that that allows for some growth during the class period, growth from 20 percent to 40 percent, right?

A Right.

Q Okay. But Dr. McClave, again, you switched here from DMA penetration to county penetration, right?

A Ultimately I looked at the county level, yes.

Q Right. But you started with the DMA, right?

A Yes, right.

Q Your starting point says Comcast has 20 percent of this whole area, right?

A Right.

Q Right. And then you say it would have gone up to 60, midpoint is 40, so I'm going to take only counties where Comcast has 40 percent, right?

A Well, again, I'm not looking at those counties. I'm trying to find a screen to look at the rest of

the nation to find places where Comcast is less likely to have the kind of presence it has in Philadelphia.

Q And that screen is a percentage in the county.

A It is.

Q Not a percentage in the DMA, right?

A That's right.

[Page 192]

Q And how you get that, to that 40 percent number is based on percentage in the DMA, right?

A In part it is, yes.

Q Okay. And what was Comcast's penetration in the counties where they were present in the beginning of the class period?

A It varied. I don't --

Q You don't know?

A No.

Q But you know that they weren't everywhere in every county, right? They were just in about, I'm looking at this, maybe half, maybe less of the counties, right?

A You're talking about in the beginning?

Q Yeah, the beginning of the class period?

A Yes, they were not in the 16 that they are now.

Q Okay. So if they only were a part of the DMA, then it stands to reason that the penetration in the counties where they were present was higher than 20 percent, right?

A In some of them it was probably, yes.

Q Right. And do you know what for example Lenfest's penetration was in the counties where it was present at the beginning of the class period?

A I know they had quite a few subscribers. I don't know exactly what their penetration was.

Q Well, Dr. Chipty is going to say that she looked into it and it was well over 60 percent. Do you have any basis to **[Page 193]** dispute that?

A No.

Q Okay. So if in fact Comcast penetration was at 60 percent or higher at the beginning of the class period, then in assuming 40 percent penetration in the but-for world, you're assuming penetration would have gone down, right?

A No. I'm assuming that I'm looking at an area that would be more competitive. As far as I know, plaintiffs have not alleged that 1999 was a competitive year in the Philadelphia market. So if that's an assumption underlying your question, that's not one that I'm making.

Q My assumption --

A I'm trying to look for places, as I've said numerous times, where there's relatively more competition than plaintiffs are alleging occurred here. And the two criteria that I chose are DBS penetration and Comcast's market share, because plaintiff's claim that those two things have occurred as a result of anti-competitive behavior.

Q But Dr. McClave again, you are dealing with a but-for world, right? But for the allegations in the Complaint, what would the world have looked

like. And if you knew that prior to in the but-for world Comcast had 60 percent of the counties, then the but-for world, how could it go down to 40 percent from 60 percent?

A First of all, I'm not making that assumption that they **[Page 194]** would have, and secondly when you say were looking for the but-for world, I think what were all really looking for is the but-for prices.

Q Were looking for --

A The question is what would the prices have been in Philadelphia absent the anti-competitive behavior. That's what I'm --

Q Right. And you're getting that by looking at benchmark counties that you say resemble what would have been the characteristics of the counties in Philadelphia but for the allegations in the Complaint. We went over that, right?

A We did, and I said to you in terms of the level of competition in those counties.

Q Right, right.

A Not necessarily that we'd know exactly what the Comcast share was going to be, or exactly what the DBS penetration was going to be. I don't think you can be that specific. At least I can't. But I can say I can find places where the level of competition might be different than it is in Philadelphia because it doesn't have the clustering and doesn't have the constrained DBS penetration.

Q Well, just summarize what you did with the Comcast share. You did not know where the county penetration was at the beginning of the class period, so you extrapolated from the DMA penetration –

[Page 195]

A Right.

Q -- and then you look at benchmark counties and you get -- you look for benchmark counties that have that penetration in the counties, right? That have 40 percent, okay.

A And I should add I also looked to see at the county level nationwide what the average was in Comcast, and as I told the Court, its between 30 and 40 percent.

Q In the DMA or in the county?

A In the county.

Q Okay.

A So I was looking at counties where the screen was slightly above average.

Q So it's your testimony that in the counties where Comcast operates, the national average is 30 to 40 percent penetration?

A National median over the time period that I looked at was 30 to 40 percent.

Q Over the time period that you looked at. Now, did you look at a reason in your benchmark cycle of the reason why Comcast had low penetration in those counties?

A No.

Q Did you look to see whether historically it was always less than 40 percent?

A Well, I didn't have the data to do that, but I didn't do it.

[Page 196]

Q Okay. Is it possible that it was a place where Comcast does not build out throughout the county?

A I'm sure that's possible.

Q It's possible it's a place that is more rural, right?

A It's possible.

Q Possible that the low penetration in those 40 percent counties in your benchmark sample have nothing to do with competitive factors, right?

A That's possible. To that extent it would seem to me it's conservative on my part because I'm looking for places that do have competitive factors. It's possible that I'm finding places that themselves are not competitive.

Q No, what I'm saying is it's possible that the reason that Comcast has not good penetration there or has got low penetration there is because of demographic factors, factors that have nothing to do with competition, right?

A Anything's possible.

Q Okay. You don't know because you just didn't look, right?

A I didn't look for specific reasons behind these that -- I'd still be at work if I had.

Q And again, if you take those counties one year at a time, it's possible over the year that you include the county in your benchmark sample one year and it's out the next year, right?

[Page 197]

A Yes. If, like in Philadelphia, a county goes from 40 percent penetration in Comcast to 60, then it's out.

Q Okay. And you agree with me that a purpose of the benchmark is to create a market that would be as similar as you can to the world that would have existed in the Philadelphia DMA?

A With regard to level of competition, yes, I agree.

Q Okay.

A With regard to trying to pinpoint an exact ADS or exact Comcast market share county by county, I can't agree to that because if plaintiff's allegations are true, the reason we don't know that in Philadelphia is because that world hasn't existed.

Q Well, so you're not saying that but for the alleged conduct Comcast would have had 40 percent penetration (indiscernible) the county, right?

A No. That's right.

Q That's not what you're saying?

A I am not saying that.

Q Okay.

A There's nothing in the model that I used that specifies a particular percentage.

Q And plaintiff's liability experts are not saying that, right, to your knowledge?

A I haven't seen them say that.

[Page 198]

Q Okay. So you're not relying on any study by plaintiff's liability experts that but for the conduct Comcast would have 40 percent penetration in the counties?

A I am not.

Q But it's still the screen that you used, right?

A It is the screen that I used, that's right.

Q Now, you mentioned before in response to one of my questions that the but-for world does not have to resemble the world prior to the bad conduct alleged in the Complaint. Remember saying that?

A I think I understand your question. Do you mean that I'm not saying that Philadelphia was necessarily a competitive but-for world in 1999 or --

Q I'm saying that in your opinion, in your analysis, you don't have to look at the world the way it existed prior to December '99, prior to the acts alleged in the Complaint as the but-for world.

A Right. I don't believe you have to do that, that's right. I didn't do that.

Q Do you think it's helpful to look at that?

A Only if there's some concrete evidence that something changed in December of '99 which changed the level of competition. Then it might be. But in this case I would rather -- remember, we only have Comcast prices from 2003 to 2008 in this case. So to me it made a lot more sense to look [Page 199] for areas in the same time frame that didn't look like Philadelphia in the challenged ways.

Q So the answer to my question is that you did not look, right? You did not look at what the

Philadelphia market looked like prior to December 1999.

A The data weren't available and it's impossible to look at.

Q Well, did you look to see what data was available?

A Absolutely. We wish we had data back to 1995 for Comcast but they only produced 2003 to 2008.

Q So that's the Comcast data.

A Yeah, the most important variable on the model, the price.

Q So then you apply your two screens that we've covered, the DBS screen and the Comcast screen, and you get a collection of counties, right?

A Yes.

Q And you agree with me that those counties are supposed to reflect characteristics that one would find absent the alleged anti-competitive conduct, right?

A My hope is that they're exhibiting levels of competition that didn't exist in the Philadelphia market because of the alleged anti-competitive conduct.

Q No, no, no, I'm not asking you about anti-competitive conduct. Do you agree with the statement that the counties **[Page 200]** are supposed to reflect characteristics that one would find absent Comcast's alleged anti-competitive conduct?

A Yes, in terms of the level of competition.

Q Well, that's what you said in your report. So let's see what you're left with once you've run your analysis.

Can I have Chipty class report, Exhibit 4, please, and that's also in your binder. It should be Tab 7, your Honor.

Q Now, this chart comes out of Dr. Chipty's report. You've seen this before, right?

A Yes, I have.

Q And Dr. Chipty compared the average characteristics of the counties in the Philadelphia cluster in your benchmark sample, right?

A Yes.

Q And do you have any reason to believe that these calculations are wrong?

A No.

Q Okay. Did you check them?

A I don't remember whether we replicated this or not but --

Q Okay, but you have no reason to believe that they're wrong.

A I don't.

Q So let's look -- may I approach the screen, your Honor?

THE COURT: Okay.

[Page 201]

BY MR. KORPUS:

Q Let's look at what she finds. The counties in your benchmark sample and an average number of

subscribers of 14,649 people, right? And she finds that the counties in the Philadelphia cluster has 112, 978,000 people in a county on average?

A Right.

Q So the average county in Philadelphia is way bigger than the average county in your sample, right?

A In terms of numbers of subscribers, yes.

Q Yes. I'm talking averages.

A Right.

Q And then let's look at household income. Median household income in your benchmark sample is $45,156.

A Correct.

Q And in the cluster an average is $57,231, right?

A Right.

So on average the level of average income is higher, much higher, one would say, in the Philadelphia counties than it is in your benchmark sample, right?

A It's higher, yes.

Q Significantly higher.

A Yes.

Q Okay. Now, let's look at population density which we talked a lot about today.

[Page 202]

A Right.

Q Now, population density in your benchmark sample is 212 people per square mile, right?

A I assume that's the level unit of measurement, yes.

Q And in Philadelphia there's 1,611 people per square mile on average, do you see that?

A I do.

Q And you don't have any basis to dispute those numbers, right?

A I don't.

Q Okay. So you agree with me that what your benchmark came up with are counties that have -- are a lot less dense than the counties in Philadelphia, right? On average.

A On average that's true. What's not reported here of course is the range, but on average you're right.

Q On average I'm right. And let me look at one more which is the last one, percent unit detached housing. Now, in your sample 69 percent of the houses, I guess, are detached housing, right?

A Right.

Q Is that how you read that? And in the Philadelphia cluster it's only 55.7 percent.

A Right.

Q And that's probably because there's a lot more MDUs, apartment buildings and those kind of structures, right?

[Page 203]

That would be your information, right?

A Yeah. I don't know what the reason is, but that's certainly a plausible explanation.

Q Because Philadelphia is more urban in a way, right?

A Well, again, I think -- you certainly try to posture this as though there's only rural counties in there. We showed that that's not true. So when you say it's more urban, certainly it's more urban on average --

Q That's all I'm saying, on average, on average. I mean we're talking about why Dr. Chipty believes it should be controlled for density and why you say it shouldn't. Dr. Chipty in looking at these results and seeing such a vast difference in density between your sample and the counties in Philadelphia believes that the model should be controlled for density. Right? That's what's going on here?

A I suppose that's what she believes, but as I showed, the control varies from model to model in it in statistically bothersome ways.

Q Okay. Now, you're not suggesting that but for the allegations in the Complaint the Philadelphia DMA would be less populous, right?

A Certainly not.

Q And you're not suggesting that but for the allegation the Philadelphia DMA -- but for the allegations of the Complaint the Philadelphia DMA would be less dense, right?

[Page 204]

A No, I'm not.

Q Right. And I'm only saying that because you're talking about the concern that it's going to

taint if you adjust for density. But density is a purely demographic measure, right?

A Density is a demographic measure. It doesn't mean it's not tainted or correlated with the anti-competitive behavior.

Q Do you believe that there is a perfect correlation between density and the anti-competitive behavior in this case?

A No, I never used the word perfect. I have concern that there is some correlation, maybe significant, because all of the work on clustering certainly has indicated that clustering tends to occur at highly urbanized populated areas.

Q Did you study the correlation between clustering and density?

A No, I read the studies that others did.

Q But you yourself did not do this.

A Did not, that's right.

Q Okay. Now, you have a chart that you talked about a lot today. So that's my chosen average. This is what we see is the picture on average between the benchmarks and the Philadelphia sample, right?

A Right.

Q Okay. And your chart showed something different. It **[Page 205]** showed just examples really.

A Yes.

Q Okay. Well, let's look at those examples. Can we get Dr. McClave's PX-81, I believe it is?

And you say there are some large urban counties in your benchmark and you list some there, and you

cited Los Angeles and Orange. I want to start a little closer to home. I want to start with New Jersey. Are there any New Jersey counties in your benchmark sample?

A I don't know. I'd have to look.

Q Okay. I'll tell you that there are none, and Dr. Chipty said there are none.

A Okay.

Q Does that surprise you? Yes or no.

A No, it doesn't surprise me.

Q What about New York? I'm going to tell you that there are no New York counties in your sample, in your benchmark sample. Does that surprise you?

A No.

Q Okay. Let's talk about where we are at in Pennsylvania. You know that not the whole of Pennsylvania is in the Philadelphia DMA, right?

A I do know that.

Q Do you know that there is just one rural county in Pennsylvania included in your benchmark sample?

[Page 206]

A Again, this is nothing that's been pointed out in any report of Dr. Chipty's or anyone else's, so I don't know it. It's not something I've looked at, no.

Q Okay. But you don't think that's something that you should look at?

A Not -- no, given the fact that I'm looking for places where there's relative competition and I have two objective criteria. I think to do anything else

would be what you accuse me of, which is cherry picking.

Q Well, let's talk about cherry picking. For the centers that you listed there, the urban centers like Los Angeles, do you know what data appears in every single year in your benchmark sample?

A No, I don't know. Each of those might appear in one year or several.

Q Yeah, well, I'll tell you that they don't appear in every year. For example, Dallas only appears one year in your benchmark sample.

A Okay.

Q And you've also listed here Gwinnett and Fulton in Georgia?

A Yes.

Q What about Atlanta, the City of Atlanta? Is that in your benchmark sample?

A The City of Atlanta I believe is in Fulton County.

[Page 207]

Q Okay, it's in Fulton County.

A Yeah.

Q There's no other county?

A No, it's in Fulton County.

Q And Salt Lake appears only twice in the sample, did you know that?

A I didn't know that, but I believe it.

Q And you've also dropped wholesale a lot of other DMAs that one might say approximate the

DMA in Philadelphia. For example, you've dropped all of San Francisco, right?

A If no San Francisco or close by counties are in there, then that's true.

Q You've dropped all of Minneapolis?

A Same answer.

Q And we'll let Dr. Chipty tell us about Denver, as Mr. Shuster said in his opening, but did you check at all to see whether it's true that you dropped the Denver metropolitan area and left only the Rockies in your benchmark sample?

A I did not. I checked the two objective criteria that we discussed.

Q Okay. And when you say that 86 percent of Comcast subscribers in the benchmark reside in counties that are more urban than rural, that is a weighted average, right?

A Yes, it's a weighted average.

Q It's a weighted average, so let's explain that. What you **[Page 208]** do is you, if there are a larger number of subscribers in a county --

A Right.

Q -- it then gets more weight than the average, right?

A Yes.

Q So denser, if you do a weighted average, denser counties by definition are going to get more weight, right?

A I presume that's right, yes.

Q Okay. And when you use the counties in your regression model, you don't use a weighted average, right?

A No.

Q Okay. So it's not really an apples to apples comparison there, right?

A It was simply intended to address your assertion that all I picked were small borough counties. The answer is there are an awful lot of prices from an awful lot of customers in my model that come from urban areas.

Q On average, it's way less than the Philadelphia DMA, that we've established.

A If you do county averages the way you've done it, the numbers are smaller.

Q Okay. Now, we've explored the demographic differences between your benchmark set and the Philadelphia cluster, and the way that that's dealt with when you do a regression is people add variables, and there's been a lot of discussion of **[Page 209]** that this morning to control for these differences, right?

A Right, to control for legitimate differences, what I call legitimate differences, yes.

Q Right. And the only demographic variable that you've controlled for is income, right?

A That's right.

Q So you did not control for density, you did not control for detached housing, you did not control for rented housing, you didn't control for any of these things, right?

A That's right. Other than as they appeared through the other variables in the model. They're not explicit in the model.

Q Right, they're not explicit in the model. And do you know whether the GAO, the FCC has found any relationship, for example, between DBS penetration and attached housing?

A They may well have found -- I wasn't modeling DBS penetration, so I didn't study their DBS models. I was modeling the price of expanded basic.

Q Now, you did not control for density, I think that much if there's nothing else has been established today.

A I did not control for it in the sense that it's in the model, that's absolutely true.

Q Right. Now, you actually considered controlling for it, right?

A Yes.

[Page 210]

Q You ran the model with population density and it gave you a positive correlation with price, right?

A Yes, that's right.

Q Okay. And that means that prices are higher in denser areas than they are in areas of the less dense, right?

A On average that would be true, according to that coefficient.

Q Which means that if you had included the population density variable, damages would have been less in Philadelphia?

A I showed that on one of the bars, yes.

Q Right, right. And you decided to exclude any variable for density in your regression model, right?

A I did.

Q Now, in your report you cite to -- you explain multiple regression. You explained it very well today here, too. But in your report you explained that it can be used in antitrust cases, and you cite to an article by Professor Rubenfeld about multiple regression or reference guide on multiple regressions. Do you remember that citation in your report?

A I do.

Q And Professor Rubenfeld says the following on page 188. Maybe we can put it up on the screen.

It's in the book, next tab.

COUNSEL: Which page are you on?

[Page 211]

MR. KORPUS: I'm on page 188 of the other one.

BY MR. KORPUS:

And this is what Professor Rubenfeld says: "Failure to include a major explanatory variable that is correlated with the variable interest in a regression model may cause an included variable to be credited with an effect that actually scores by the excluded variable. In general, omitted variables that are correlated with the dependent variable reduce the probative value of their regression analysis. This may make for inferences made from regression analysis that do not assist the trier of fact."

You see the quote?

A I do.

Q And I showed it to you in your deposition and you agreed with that statement, right?

A In general it's a true statement.

Q And you say that the reason that you did not include densities is first of all because you had an a priori expectation that would be correlated with -- that it would be negatively correlated and it was positively correlated, right?

A That's right.

Q And as for your a priori expectation, you had never worked in cable before this case; is that right?

A That's true.

[Page 212]

Q You never did a regression analysis in cable before this day?

A That's right, that's true.

Q Or any other MVPD operator or industry.

A Also true.

Q You never wrote any articles on the cable industry?

A Correct.

Q Never ran any regressions in any publications in the cable industry?

A True.

Q And Dr. Chipty has done regressions in the cable industry, right?

A She's done 50 or more in this case. I don't know if she's done others.

Q Are you not familiar with Dr. Chipty's background as a cable economist?

A No, not with any detail, no.

Q Okay. Do you know that the FCC has referred to articles by Dr. Chipty on cable regressions?

A I hadn't read those.

Q Do you know that Dr. Chipty has published several regressions in peer review publications in cable?

A I don't think I've seen those.

Q Okay. But you criticize her for having no plausible economic theory for including the density variable, right?

[Page 213]

A I criticize her for that and the fact that over the course of her models she's going to have to change theories because 70 percent of the time it's not significant, a few times it's positive and a few times it's negative and significant --

Q But she includes it anyway to see what happens in the regression, right?

A She evidently includes it no matter what.

Q That's what you do. You put in the variable and you see what the effect is. You don't decide up front, oh, I think it's going to have a positive effect and then not include it. Isn't that what Professor Rubenfeld says?

A No. I mean you're quoting one passage from what he says. You also find in there the importance of not including exploratory variables that are tied to anti-competitive behavior if you're doing an antitrust

model. And you'll also find if not in Dr. Rubenfeld, in a number of the cites that Dr. Chipty cites to the importance of making sure the variables in the model conform or comport with economic theory.

Q Right. And Dr. Chipty in her report as a person that is familiar with cable stated that density could have a positive correlation with price because areas that are more dense could also have more demand for cable services, right?

A Well, you've already got demand in the model in median **[Page 214]** income. No, I don't agree with that. It's contrary to Comcast's own assertion before the FCC when they're arguing for swaps and acquisitions, they say if we get a greater presence in highly-populated areas our costs go down.

Q Wait a second. You say you don't agree with that. You do not agree with the proposition that there may be more demand in dense areas?

A On a per capital basis? No. I think the cost argument is much more persuasive.

Q It hasn't been your observations that dense areas like New York generally may have higher prices for goods and services than more rural areas?

A Well, again we're now talking in general.

Q Yeah, I'm talking in general.

A I think it depends. If it costs more to serve rural areas, the price of the good might go up quite a bit.

Q There might be a cost effect? There might be a demand effect.

A Again, anything's possible. The problem is with population density it's so inconsistent in her

models that you have to make up a different explanation depending on the model.

Q All right. Well, it's not inconsistent to the extent that if she added to your damages model, it has a very significant effect, right?

[Page 215]

A It reduces damages for reasons that I believe are related to the anti-competitive conduct.

MR. KORPUS: Oh, its 4:15, your Honor.

THE COURT: You pick your place.

MR. KORPUS: Let me just see where I am.

Yeah, I think I'm good here.

THE COURT: Okay, fine. We'll recess until 9:30 tomorrow morning.

(Proceedings concluded for the day at 4:14 o'clock p.m.)

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW BEHREND, et al.	:	CIVIL ACTION
	:	NO. 03-6604
	:	
v.	:	Philadelphia,
	:	Pennsylvania
COMCAST	:	October 14, 2009
CORPORATION, et al.	:	9:43 o'clock a.m.
	:	

. . . . . .

HEARING
BEFORE THE HONORABLE JOHN R. PADOVA
UNITED STATES DISTRICT COURT JUDGE

* * *

[Page 3]

(The following occurred in open court at 9:43 o'clock a.m.:)

THE COURT: You understand you are still under oath.

You may proceed.

MR. KORPUS: Thank you, your Honor. Your Honor, just one thing from yesterday. We added some premarked exhibit tabs to the binder I gave you and I used the one exhibit yesterday which was in Tab 8, I believe. We've marked it as Defense Exhibit 1. It's the article by professor Rubenfeld, and I move for its admission into evidence.

THE COURT: It's admitted.

MR. GOLDBERG: No objection.

(Defense Exhibit 1 admitted into evidence.)

JAMES T. McCLAVE, Previously Sworn, testified further as follows:

CROSS-EXAMINATION (Continued)

BY MR. KORPUS:

Q. Good morning, Dr. McClave.

A. Good morning, Mr. Korpus.

Q. I want to go back and just establish one thing about your credentials. You're a statistician by trade; is that right?

A. My education is in statistics, that's right.

Q. You're not an economist?

A. No.

[Page 4]

Q. Now, I think where we left off is we're talking about density and the difference between the density of the benchmark counties and the counties in Philadelphia and Dr. Chipty's opinion that the regression model should be controlled for density, and your opinion that it should not be controlled for density. You recall all of that discussion?

A. I do.

Q. Okay. And one of the reasons you said you did not control for density was that you thought that population density may be tainted by the allegations in the case, right?

A. Yes.

Q. And we've established that you're not saying that by virtue of the alleged anti-competitive conduct Comcast made the area more or less dense, right?

A. I wouldn't draw that causal relationship.

Q. Right. All you're saying is that there might be a relationship between clustering in dense areas.

A. Yes.

Q. Or there's also a relationship between income and clustered areas, right?

A. There could be.

Q. You've read some stuff on that. There's generally more clustering in areas that have higher income, right?

A. I have read some information like that, yes, that's **[Page 5]** right.

Q. And yet you still included your variable for income in your model, right?

A. I did. I thought there needed to be some adjustment for the differences between the benchmark and Philadelphia, despite the fact that it may be providing a conservative estimate of the true damages.

Q. So you included income but you chose not to include density.

A. That's right.

Q. That's correct?

A. That's correct.

Q. Okay. Well, let's look at some other regression studies in the industry.

A. Okay.

Q. Are you familiar with the FCC pricing study in 2009?

A. I've looked at that.

Q. You've looked at it, you've read it?

A. I believe so.

Q. And it's referred to in your report as one of the documents that you rely on, right?

A. Yes.

Q. And the FCC ran a regression which modeled the effect of various things on cable prices, right?

A. I don't remember if they did in that particular report, **[Page 6]** but they certainly have done that over the years.

Q. Okay. Do you remember that in that report the model -- the effect of DBS presence on cable prices?

A. Again I don't recall the specifics of that particular report. I know they've done that at times over the years.

Q. All right, well, let's look at the report. It's in your binder at Tab 9, I believe.

A. Okay.

Q. And it's marked as Defendant's Exhibit 2. And before we go to -- let's look at the third page, and the paragraph in between the two graphs.

Can you blow it up a little more?

And you see that they concluded, the FCC concluded there in the second sentence that it does not appear from these results that DBS effectively constrains cable prices.

A. I see that.

Q. You see that line.

A. Right.

Q. And do you recall that they found that to be --

THE COURT: Can you hang on one second, Counsel? I just want to read that.

MR. KORPUS: Yes.

(Pause.)

THE COURT: Very well, thank you. You may proceed.

BY MR. KORPUS:

[Page 7]

Q. And you see that they found that to be the fact, the case in '06, '07 and '08?

A. Yes, I do. They're basing that on a simple average price.

Q. Well, did they not in fact do a regression as well in this document?

A. As I read this document, they're referring to chart one which is an average price.

Q. All right. Well, let's look at their econometric analysis which is in appendix B of the same document.

A. Okay.

MR. KORPUS: It's on page 81, your Honor.

BY MR. KORPUS:

Q. Have you looked at this model?

A. I have seen this model.

Q. And this is a regression analysis, a multi-regression analysis, right?

A. Multiple regression analysis, I think that's what it is. Let me look at it for a second.

Yes.

Q. Which is the kind of regression that we were talking about yesterday that you did in this case, right?

A. That's right.

Q. Okay. And the FCC has in here the specifications that they use for this model, right?

[Page 8]

A. They do.

Q. And they list density on page 81, the last line --

A. They do.

Q. -- as one of the variables that they control for in-depth study, right?

THE COURT: It's listed twice, density and density squared. Why?

MR. KORPUS: Mr. McClave can explain for you square variable, I believe, your Honor. It gives you another measure of the extent of it, but maybe it's a question for the statistician.

THE COURT: Yes, all right. Thank you.

THE WITNESS: Your Honor, to answer your question, it allows some curvature in the relationship, so instead of a straight line up or a straight line down it allows some curvature. If you look at page 85, the model is there. And I would point out to the

Court, I'm looking at the top regression which is the dependent variable where it says log price. And if you drop down to log density and log density squared, do you see what those estimated coefficients are?

THE COURT: I do.

THE WITNESS: Both zero and both -- and then the T statistics next to it. Neither one significant, statistically significant.

BY MR. KORPUS:

[Page 9]

Q. They found that it was not significant in this model.

A. That's right, yes.

Q. But they still included it, right?

A. They tried it.

Q. They tried it.

A. Just like I did.

Q. No, but they included it in their results.

A. They reported the result, that's right.

Q. They reported the result. You did not do the same thing. You tried it, then you took it out and did not report it in the results.

A. Absolutely. I wasn't doing a research study. I was estimating prices, about four prices.

Q. And it wasn't the fact that it wasn't significant when you tried it. It was significant. You just had the wrong sign.

A. It was wrong sign, that's right.

Q. In your opinion the wrong sign.

A. In my opinion and in the opinion of many others.

Q. Well, in your opinion.

A. In my opinion, and yes, it's ultimately my opinion, but I'm not the only one that holds that.

Q. Do you have any support, is there anybody else in the cable industry has reported that density must always have a negative correlation with price and that if it has a positive **[Page 10]** correlation with price, then it's the wrong sign and should be excluded?

A. There are those who have said that the expected sign is negative. I don't know that anybody has said if it's positive, I will exclude it.

Q. Who said the expected sign is negative?

A. I don't remember the article. I'd have to go back to my research notes.

Q. Okay. Sitting here today you don't have that?

A. I cannot cite one off the top of my head, that's right.

Q. Now, do you see the same regression -- can we go back to the regression table?

THE COURT: Doctor, what do you want me to make out of the fact that we've got a study by the FCC in which density and density squared is apart.

THE WITNESS: Right.

THE COURT: And we have a study by you in which density and density squared is not a part.

THE WITNESS: Right.

THE COURT: What do I make out of that?

THE WITNESS: Your Honor, first of all I think it's important to understand the reason for specifying a model. These FCC studies in my view, and I think you'll find it in the studies, are exploratory. What is it that's affecting cable prices? They don't go to the next step of saying, and **[Page 11]** I'm going to use this model to estimate cable prices in some region.

So from my perspective, from a statistical --

THE COURT: Well, in determining that, they saw fit to improve density, and you did not.

THE WITNESS: That's right.

THE COURT: And you say that's because there's a difference in objectives with respect to the studies?

THE WITNESS: In my opinion that would be one reason. It may also be a difference in philosophy.

THE COURT: Let's focus on the difference between objectives. What's the difference between objectives that's relevant and significant with respect to whether density should be included or should not be included?

THE WITNESS: Okay. First of all, if density -- let's talk about two things: If it's wrong sign, which is what happened in that model when I added it. If it's wrong sign, then one thing I have to think about that the FCC doesn't is what's the reason for that? I concluded that it may well be, given all the studies about clustering and what Mr. Korpus just asked me about, that it's because of the alleged anti-competitive conduct.

THE COURT: Contamination?

THE WITNESS: Yes, contamination. That's something they don't need to worry about.

[Page 12]

The second thing that I would look at that didn't apply in my case but does in this case is statistical significance. Certainly if there were discussion about this model by a statistician, you'd say my gosh, to three places the coefficients are zero. Density's not having any effect. So if you were going to use this model to estimate prices, statisticians at least would be saying let's clean this model up. Let's be left with things that make sense and are statistically significant.

And, your Honor, if you'll abide me, this is not just my philosophy. This is in my last report, quote from Peter Kennedy who has got a book called A Guide To Econometrics.

"The first step is always to check economic theory. It is amazing how after the fact economists can conjure up rationales for incorrect signs, but one should never stop here. If there was a good reason a priori to expect a different sign, there is a moral obligation to check econometric reasons for why the wrong sign was obtained before changing a theory."

That's a philosophy to which I adhere.

THE COURT: Thank you, Doctor.

You may proceed.

BY MR. KORPUS:

Q. The economic theory you refer to was just in your **[Page 13]** conclusion that the sign was wrong,

right? Your a priori expectation that it would be negative and it turned out to be positive.

A. That's right. And again as I mention, even in Comcast's own submissions to the FCC, it talks about the fact that there will be economic efficiencies due to clustering in populated areas which will lower our costs. That's the genesis of the expectation, that I hold and that others hold.

Q. That's one side of the equation, that's the cost side. There's also the revenue side, and there is also an expectation its revenues might be higher in places that are more dense. We went over that yesterday, right? It's possible.

A. Well, certainly revenues will be higher if the cable company raises its prices, absolutely.

Q. Well, even without that, right?

A. No. Revenue --

Q. You are not -- just one second, Dr. McClave. Are you saying that there is no support for the proposition that in dense areas there may be higher prices for goods and services? That's not possible?

A. Again, anything's possible.

Q. You just haven't looked at it?

A. I've looked at it very carefully.

Q. But you don't know sitting here today.

[Page 14]

A. I know what my opinion and expectation is, and I know I'm not the only one that holds that.

Q. Well, going back to this issue of contamination or taint, do you have any support for the proposition that an exogenous demographic variable can

be tainted or contaminated? Have you ever heard that anywhere in the literature?

A. Yes.

Q. Sitting here today, can you give me a cite for that?

A. Certainly I would consider in many cases costs to be an exogenous variable.

Q. No, I'm talking about the demographic variable.

A. Oh, you said exogenous.

Q. I said exogenous demographic.

A. Well, any of the studies that tie clustering to demographic variables, it seems to me given that clustering is one of the principal allegations in this case are examples exactly of that.

Q. Now, let's talk about what the FCC did and what you did.

A. Okay.

Q. Because the FCC is also looking at the relationship between various things and price, right?

A. Yes.

Q. They're looking to see what's affecting cable prices.

A. Yes.

Q. And you're also looking at what's affecting cable prices.

[Page 15]

A. I am.

Q. And what you're doing is you're trying to control for certain variables, and you're saying the rest is due to the anti-competitive conduct, and should be the damages in this case.

A. I'm saying -- right. I'm saying that when this model is used to estimate prices in the Philadelphia market that the amount that's -- if they're greater than that, then I believe that that is consistent with the plaintiff's allegations, that difference.

Q. But the purpose of adding variables is to control for those variables, to take them out of the equation, right, the purpose of adding the explanatory variables. And to say that you've eliminated now the effect of income, you've eliminated the effect of channel capacity and everything that's left over is just due to the anti-competitive conduct alleged in the Complaint, those are the damages suffered by the class.

A. I would put it a little differently. It's not eliminating, it's in the model.

Q. Yeah.

A. You pointed out yesterday that there are differences between the benchmark and Philadelphia in terms of things like median income. The reason to put things like that in the model is to adjust for those differences, to take the benchmark prices and adjust them so that they're comparable **[Page 16]** to the Philadelphia prices. And it's not eliminating them, it's using them.

Q. It's using them. But everything that's left over after that is damages.

A. If there's any difference between the estimated price and the Philadelphia price, that's what I've calculated as overcharge or damages.

Q. And density was also one of those differences that I showed you yesterday between Philadelphia and the benchmarks.

A. It was.

MR. KORPUS: Your Honor, I move for the admission of Defense Exhibit 2 into evidence.

THE COURT: It is admitted.

(Defense Exhibit 2 admitted into evidence.)

MR. KORPUS: My apologies, your Honor, I seem to have displaced my notes.

THE COURT: It's all right.

MR. KORPUS: One second.

BY MR. KORPUS:

Q. But if you move on to the next tab in your binder, there's a study done by the GAO in '05. Are you familiar with this study?

A. Is that Tab 10?

Q. Yes, I believe so. Premarked as Exhibit 3?

A. Yes, I've seen this study.

[Page 17]

Q. And that's also a study that's cited in your report as a document you refer to or rely on, right?

A. Yes.

Q. And the GAO is the Government Accountability Office, right?

A. That's right.

Q. And this study also looked in the effect -- at various things that affect cable prices, right? Are you familiar with that?

A. I am.

Q. And if we look on page 24 of the study, there's a list of the variables that are being used by the GAO.

A. Yes.

MR. KORPUS: Table one, your Honor.

Your Honor --

THE COURT: What page, where is this?

MR. KORPUS: It's on page 24, table one of the study.

THE COURT: I've got it, thank you.

BY MR. KORPUS:

Q. You see there's a heading, explanatory variables used in cable satellite model.

A. I do see that.

Q. And about two-thirds down there is a heading population density as one of those variables; do you see that?

[Page 18]

A. I do.

Q. So the GAO also used population density in this model which looks at the various things that affect cable prices, right?

A. They did.

MR. KORPUS: Your Honor, we move for the admission of Exhibit 3 into evidence.

THE COURT: It's admitted.

(Defense Exhibit 3 admitted into evidence.)

BY MR. KORPUS:

Q. And you know that this is just one of various GAO studies that are done somewhat annually, right?

A. I realize that, yes.

Q. And you've seen some of these other ones, too?

A. Yes.

Q. And many of those other ones also have a population density variable in there, right?

A. It's certainly possible.

Q. I'll just show you one more. I won't belabor the Court with too many, but I can show you the one for '02.

MR. KORPUS: This one is actually not in the binder. May I approach, your Honor?

THE COURT: Yes. Is there an exhibit number?

MR. KORPUS: I premarked it as Exhibit 13.

THE COURT: Okay. This is GAO for October 2002.

[Page 19]

MR. KORPUS: Yes, your Honor.

BY MR. KORPUS:

Q. This is another study that's similar to some of the other GAO studies done by the GAO, right?

A. Right.

Q. And it also looks at the effect of various things that affect cable prices, right?

A. Right.

Q. And this GAO study also has a regression analysis in there, right?

A. It does.

Q. And they also listed variables they are using in their regression analysis, right?

A. Right.

THE COURT: Page 47?

MR. KORPUS: Exactly right, your Honor.

BY MR. KORPUS:

Q. And one of those variables there is population density, right?

A. It is, and again not statistically significant.

Q. But included in the model.

THE COURT: What does that mean? Excuse me a second, Counselor. You'll forgive me for the interruption.

MR. KORPUS: No, I welcome the interruption.

THE COURT: What does that mean, not statistically **[Page 20]** significant? Does that mean that if we lifted that variable out completely, population density, the result wouldn't be different to any significant --

THE WITNESS: Certainly in terms of using it to predict prices, yes. What it literally means, your Honor, you can't reject the hypothesis that the true coefficient, the true weight is zero, that it's in there, but explaining nothing more than random variation.

THE COURT: Okay. That's the engineering aspect of it. A guy like me from the street, what am I to conclude with respect to that? Am I to conclude that although population density was included by the GAO in 2002 and 2003, the result would have been the same had it not been included? When I say the same, I mean no significant difference.

THE WITNESS: Right. That's right.

THE COURT: I can conclude that?

THE WITNESS: Absolutely.

THE COURT: Thank you.

MR. KORPUS: That's the case for the GAO model. That's not the case for Mr. McClave's model.

THE COURT: I'm talking about the GAO model.

MR. KORPUS: I can't remember if I already asked to move Exhibit 13 into evidence.

THE COURT: It's admitted.

(Defense Exhibit 13 admitted into evidence.)

[Page 21]

BY MR. KORPUS:

Q. Okay, so these were some of the Government studies. Oh, by the way, I'm sorry. I forgot to ask some stuff. I want to go back to the '05 report.

THE COURT: GAO '05?

MR. KORPUS: GAO '05 report, yes, your Honor.

THE COURT: Exhibit number? D ...

COUNSEL: 3.

THE COURT: D-3, right.

Q. Now, you know that one of the factors that GAO looked at in this report is the effect on DBS penetration, right? Are you familiar with that?

A. Let me look. Some of their studies do and some don't.

Q. Okay. Well, let me point you to page 7.

A. Well, I'm actually looking at the models, but I'll look at page 7.

Okay.

Q. And on page 7 of the study, your Honor, the GAO found that there was higher penetration in more rural areas. Higher DBS penetration in more rural areas, right?

A. Apparently so in early days, but it says then it's also been -- growth has been higher in urban areas since then.

Q. That's right. But the greatest penetration of DBS, the GAO found higher penetration of DBS in rural areas than in urban areas.

[Page 22]

A. Yes.

Q. And they also found higher penetration in non-metropolitan areas, right?

A. Well, you're calling those the suburban bars on that chart?

Q. Yes.

A. Yes.

Q. Okay. And the cluster here includes the City of Philadelphia, right, the cluster in this case?

A. Yes.

Q. And the City of Philadelphia is an urban area, right?

A. Yes.

Q. And it has lots of MDUs, right?

A. Yes.

Q. Which are multiple dwelling units, right?

A. I would assume that it does, yes.

Q. And the GAO found lower DBS penetration in markets that have high prevalence of multiple dwelling units, right?

THE COURT: I'm sorry, will you repeat that question?

MR. KORPUS: Yes, sir.

Q. If you look at page 4 of the GAO study. Maybe this is a much better way of doing it for your Honor.

If you look at page 4 in the second paragraph, there is some conclusions of what the GAO found on geographic **[Page 23]** factors. And they say we found that the DBS penetration rate is lower in markets with high prevalence of multiple dwelling units, such as apartments and condominiums. Do you see that?

A. I do.

Q. And they said that the DBS penetration is higher -- I'm just skipping to the third one -- in non-metropolitan areas, right?

A. Right.

THE COURT: Connect your point to the methodology that we're talking about with your next question.

Q. So when the GAO did the regression analysis, they controlled for non-metropolitan areas and they controlled for urbanization, if you turn to page 31 of the GAO study.

A. When they did their four models there and the fourth one on the far right on page 31 is for DBS penetration equation.

Q. That's right.

A. I didn't do a DBS model, I did a price model.

Q. That's right. But one of the things that you're investigating in your model is the allegation that DBS penetration would have been different but for the allegations in the Complaint and how that would affect pricing, right?

A. No, I don't understand that. I understand my assignment to be assume that DBS penetration would have been greater because that's one of the plaintiffs' allegations but for the, for example, the exclusivity on the Sports Network. **[Page 24]** So I'm making the assumption that I should look at areas with relatively high DBS penetration in order to assess the effect on price as a direct result of the allegations in this case.

Q. But when you're looking at the areas that have high DBS penetration, you are not controlling for whatever may be the reason for that high penetration, whether it's more rural or whether it's less urban, or non-metropolitan, none of that goes into your analysis. You're just taking the number.

A. I disagree with you. I think things like median income and channel capacity are correlated with the kinds of things you're talking about. The attempt there is to make the transfer from places that are not like Philadelphia to places that are like Philadelphia.

Q. You're adding other variables that may be somewhat correlated with it, but you're not adding direct variables for urbanicity or MDU presence or anything like that, right?

A. Those particular variables are not in the model. But I believe that the variables that are in the model are capturing or proxying for many of those factors. And I believe the fact that when --

Q. If I wanted to submit a paper on the average income -- if I wanted to submit a paper on the presence of MDUs in Philadelphia, can I just submit a paper on income and ask the reader to extrapolate from that what the presence of MDUs might be?

[Page 25]

A. No, again, I wasn't trying to study MDUs.

Q. Okay.

A. I'm simply saying that urban areas tend to have higher median incomes than rural areas.

Q. Okay. Now, in addition to government studies there are also some academic writings in the industry that have looked at cable prices, right?

A. Sure.

Q. And some of them also are referred to in your reports, right?

A. Yes.

Q. And for example are you familiar with an article by Professor Savage and Worth?

A. I am.

Q. And that's also relied on in your report, right?

A. Yes, I read the article.

Q. And that's on Tab, I believe Tab 11 of your binder, okay? Premarked as Defense Exhibit 4.

THE COURT: D-4 is admitted.

(Exhibit D-4 admitted into evidence.)

BY MR. KORPUS:

Q. And D-4 is a study done by Savage and Worth which modeled the effect of overbuilder entry onto prices, right?

THE COURT: Counsel, just give me one second, I want to read.

[Page 26]

MR. KORPUS: Please, your Honor, of course.

(Pause.)

THE COURT: Okay, thank you, go ahead.

THE WITNESS: I think that's one of the things that they were studying, yes.

BY MR. KORPUS:

Q. And they have a regression analysis in here that looks at the various things that affect pricing. You can look at page 32 of the model.

A. Okay.

Q. And they have the formula here and we can see that one of the elements they looked at here is density. You see the D-E-N in line two.

A. I do.

Q. Okay. So Savage and Worth also included density in their model, right?

A. The did, and if you look at page 38, they did get the expected sign on density, negative and statistically significant.

Q. Right, and they included it in the model.

A. They sure did.

Q. And they included other things in this model that might not have come out as being statistically significant, right? But they showed them in the reports?

A. Sure. Yeah. I mean when you're testing model -- when **[Page 27]** you're doing the exploratory stage you're going to find some variables that are not statistically significant.

Q. And when they submitted the article for publication, they included all of the variables.

A. They left them in.

Q. Left them in.

You also rely on an article by Emmons and Prager, right?

A. Well, I've read it. I'm not sure relying on --

Q. Well, it's listed in your rebuttal report as one of the documents that you relied on?

A. Sure. I'm required to tell you everything that I've read and looked at, so this is one of the things that I did, yes.

Q. And this is in the next tab in your binder?

A. Yes.

Q. Premarked as Defense Exhibit 5.

MR. KORPUS: I move it into evidence, your Honor.

THE COURT: It's admitted.

(Defense Exhibit 5 admitted into evidence.)

BY MR. KORPUS:

Q. And they looked at pricing in the cable industry as well, right?

THE COURT: Where was this tab?

MR. KORPUS: It's Tab 12, your Honor.

THE COURT: I have it, yes, D-5.

[Page 28]

THE WITNESS: They did.

BY MR. KORPUS:

Q. And if you look at their regression analysis which is on page 736 of my copy of the article, they also included certain demographics that they controlled for, including density and population, right?

A. I see density --

THE COURT: Density, income, pop, population, table one, bottom.

THE WITNESS: Maybe I am looking at the wrong page.

THE COURT: Page 736.

THE WITNESS: I'm sorry, I'm on the wrong page.

THE COURT: Am I correct, Counselor?

MR. KORPUS: Yes, you are correct, your Honor.

THE WITNESS: Oh, that's not the model. Those are sample means.

BY MR. KORPUS:

Q. Right, but --

A. The model is on page, your Honor, on page 741, I believe. And in that particular model, I may be missing it, I don't see population, I see density.

Q. Thank you, Dr. McClave, you are correct. My mistake.

A. And density has a negative sign as statistically significant.

Q. And included in the model.

[Page 29]

A. And these are some of the cites you asked me about before, and I didn't remember of the top of my head. These are some of the cites that I relied on for the expectation that there would be a negative relationship, if it was going to be significant.

Q. Right, but these articles also tell you that you should include a variable. These articles don't say that if the relationship comes out as positive, you should throw it out.

A. No, they don't say that.

Q. Okay.

THE COURT: Do these articles forgive not including it in the first instance?

THE WITNESS: I would say the articles say you should look at it, you should try it, as I did. But again I think you then have to scrutinize and ask yourself is it significant and does it have the expected --

BY MR. KORPUS:

Q. But we agree that it is significant in your model, it has a significant effect on the damages in your model to the tune of hundreds of millions of dollars.

A. That's correct.

Q. Okay.

THE COURT: I'm not going to let that go, because I don't understand your answer. Tables that counsel is going through with you show that density was taken into **[Page 30]** consideration and in each case found not to be significant.

MR. KORPUS: No, I don't think that's --

THE COURT: Sure.

MR. KORPUS: In some of them they were found not to be significant.

THE COURT: Okay, in some of them.

THE WITNESS: And any of those that it was significant, your Honor, it had a negative relationship to price, meaning as density increased, price went down.

THE COURT: I see, okay. Thank you.

MR. KORPUS: But in his model, your Honor --

THE COURT: In his model it's not in there.

MR. KORPUS: And it is significant. In his model, your Honor, I think Dr. McClave admitted if he would have put it in damages would have been hundreds of millions of dollars different. That might not be significant based on the data that these people were working on, but on the data that Dr. McClave was working on, because of the way that the benchmark was designed, that it was significant.

THE COURT: Is that correct?

THE WITNESS: No. The very last part is incorrect, your Honor.

MR. KORPUS: That because Dr. McClave --

THE WITNESS: The because part was his.

THE COURT: Explain it to me again.

[Page 31]

THE WITNESS: Okay. When I put it in the model, your Honor, it's true that it was statistically significant. And it's also true that its sign was positive, contrary to everything that I had looked at, pretty much. There may be one or two exceptions. I said to myself, do I leave it in or do I take it out? I've already got median income in there. It's positive significant. It may be related as Mr. Korpus said to the alleged anti-competitive conduct, but I've got to make some adjustment between this benchmark and Philadelphia. Adding population density I felt was not right because it had the wrong sign and because it much more is related to clustering.

THE COURT: Okay.

BY MR. KORPUS:

Q. But you don't disagree with me, Dr. McClave, that it has hundreds of millions of dollars of effect on your model.

A. I think that -- in fact on an exhibit right there on the board, the second one if you could remove the lower one, I told the Court exactly what effect it has. It goes from 800 million to 600 million, something like that.

Q. I'm not sure that those numbers are quite right. It might be higher in Dr. Chipty's report.

THE COURT: Okay, I got it. You may proceed.

Q. Now, you know that the plaintiffs in this case are relying on the study done by Oseg and Willig (ph)?

[Page 32]

A. Yes.

Q. Have you looked at that issue at all?

A. I have.

Q. Have you looked at the one page summary of the regression analysis by Oseg and Willig?

A. I did.

Q. And that also controlled for density, right?

A. I don't recall whether it does or not. It may.

Q. Well, we can look at it, it's right here.

Do you see in footnote two there is the factors that they controlled for, and one of those is population density, right?

A. Right.

Q. Okay. And they also controlled for percentage of MDU, right?

A. Yes.

Q. And Professor Levenson was retained by plaintiffs as an expert in this case to respond to the Willig and Oseg report that we submitted, right? Are you familiar with that?

A. I read his report. I believe that's right.

Q. Did you read his deposition?

A. No, I haven't.

Q. Would it surprise you that Dr. Levenson said that he thought that the variables included in the Willig and Oseg analysis were reasonable?

[Page 33]

A. It wouldn't surprise me one way or the other.

Q. Okay. Professor Levenson also testified that he thought it was not a good idea to omit one of those variables.

A. It may well be that he did. I'd have to look at the context.

Q. Okay.

A. Again this one page -- we're looking at Exhibit D-6, is that right?

Q. Yes.

A. It's very important to a statistician that -- you'll notice, your Honor, that when he comes down to demographics on this one page, it says included. It doesn't tell us what the coefficients are, what the signs were or anything. But if you look at the top

there, and one of the things that's cited in this study is Philadelphia prices are elevated somewhere between $4.27, that's the bold, and $7.47, even after controlling for all this stuff, whatever their signs were. So I can't evaluate this, and as you know, we were not allowed to look or have not been able to look at the regression behind this.

Q. Right. And Professor Willig and Mr. Oseg submitted their report where they explained what was driving that result and what was not driving that result, and you read that report, right?

A. I read their report, yes.

[Page 34]

Q. Let's move off the subject of population density onto a new subject.

A. Good. (Laughter.)

MR. KORPUS: I'm sure your Honor is happy about that, too.

BY MR. KORPUS:

Q. So you now have your benchmark sample which you adjusted only for income and channel capacity in terms of the continuous variables, right?

A. Yeah, those are the only two continuous variables in the model, that's right.

Q. And after you got your sample, you have the but-for -- when you ran your model you have the but-for prices that you say that the people in Philadelphia would have paid but for the alleged conduct in the Complaint, right?

A. This model is used to estimate those prices.

Q. Right. And that but-for price is based on Comcast prices, right?

A. Right, yes. I used Comcast prices to estimate the but - for world.

Q. That's right. So in your but-for world, all of the subs in the Philadelphia DMA are paying the Comcast prices, right, in the benchmark counties after all of your adjustments.

A. I'm sorry, I'm not sure I understand. Are you asking me -- I'm sorry.

[Page 35]

Q. Let me repeat the question.

A. Yes.

Q. You have your but-for world.

A. Okay.

Q. Which is all based on Comcast prices.

MR. KORPUS: May I approach, your Honor?

THE COURT: Yes.

Q. This here -- I'm not going to (indiscernible) Comcast products right? This is all based on --

A. Oh, absolutely.

Q. Okay. So when you do the but-for prices, then these are prices, right, that the subs in the Philadelphia would be paying, they're paying Comcast prices.

A. There are estimates of but-for prices in the Philadelphia market that are based on other Comcast prices.

Q. That's right.

A. That's right.

Q. That's right.

A. Yes.

Q. But in your but-for world in every county, only 40 percent are Comcast subs, right?

A. No, you keep saying that.

Q. That is your benchmark.

A. It is the way I -- it is the objective criteria I use to find relatively competitive places. It was not part of my [**Page 36**] assignment and it's not a study I've done to try to save what the Comcast subscriber share would have been in the but-for world. It might be higher, it might be lower. But the one thing I am saying is that prices would have been lower.

Q. Okay. So your but-for world does not necessarily resemble what would have happened at the allegations being true in the Complaint?

A. In terms of price it does.

Q. But not in terms of market share of Comcast?

A. I think it generally implies that it would have been -- probably would have been lower, and that DBS penetration would have been higher. But again what I'm resisting is saying it would have been a specific number.

Q. So the benchmark you have, that 40 percent, it would be no more than 40 percent Comcast penetration. That's not necessarily the case in the but-for world, right?

A. That's right.

Q. And it's not necessarily the case in the but-for world that ABS penetration would be at a national median and no higher?

A. That's also true.

Q. But you think that it would be -- that the Comcast penetration would be a little less than it is today, and the satellite penetration might be a little higher than it is today, right?

[Page 37]

A. Again, what I'm saying is the environment according to plaintiffs would have been more competitive, however it got there, in terms of market share, overbuilding, DBS penetration.

Q. Okay. But you don't put any numbers on that.

A. I have not tried to put a number on that.

Q. But you have put numbers on the benchmarks that you --

A. It was necessary, I thought, to have an objective criteria to look for places that had relative levels of competition.

Q. But you do admit that in the but-for world there would be more satellite subscribers than there are today, right?

A. Well, I'm assuming that because it's one of plaintiff's allegations.

Q. Right. So you're assuming in the but-for world some of the subscribers in the class would not be Comcast subscribers, they would be satellite subscribers, right?

A. I think that's a reasonable conclusion.

Q. That follows from that, right?

A. It's not something I thought about in any kind of depth. I talk about DBS penetration. In order to get that penetration they might be getting new subscribers, they might be getting Comcast, I don't know. I think it's a reasonable assumption.

Q. Okay. And those people will be paying DBS prices, not **[Page 38]** Comcast prices, right?

A. Yes. Those people that switch would be paying DBS prices.

Q. So when you're looking at how they're impacted by the allegations, you really need to look at what their prices would have been, what they would have paid, right? You need to look at DBS prices.

A. Well, first of all, I didn't have DBS prices.

Q. You didn't have DB --

A. But I think it's reasonable assumption in econometrics that in a competitive market, prices reach some sort of equilibrium. That's certainly an assumption behind this, that this price, this but-for price, represents a competitive price that customers were more likely to pay than the prices they paid Comcast.

Q. So your assumption is that the customers who switched to DBS will be paying a price that's more or less the same as what the Comcast price would have been.

A. Yes, this was -- again, we can't know what the world would have looked like absent the allegations. This is my best estimate of price that customers would have been paying absent that conduct.

Q. But you didn't actually look at the DBS prices of doing analysis on the DBS prices.

A. I did not have them so I could not look at them.

[Page 39]

Q. Did you look for them?

A. Sure. I looked for prices everywhere I could find them. I looked at fact book prices until I realized that they were grossly in error. I looked at every source of price that I could think of.

Q. You know DBS charges a national price, same price everywhere.

A. I'm aware that they have various packages, but they have a national

Q. And you couldn't find what that price was for the six years that are at issue here? Did you actually try to look for that? Did you go on the internet and try to find DirectTV's price in '07, '08, for example?

A. I was looking at expanded basic cable prices, not DBS prices.

Q. So you didn't look?

A. I looked for expanded basic cable prices in every source I could think of.

Q. Dr. McClave, I asked you whether you looked for DBS prices.

A. No, I did not look for DBS prices.

Q. Okay. I want to talk about the overbuilding assumption in your model. You assume that but for the allegations in the Complaint there would be more overbuilding in the Philadelphia DMA, right?

[Page 40]

A. Yes.

Q. And your model assumes in its most conservative form, as you put it, there would be presence of overbuilders in five counties in the DMA in the but-for world.

A. That's what I assume.

Q. And those are Bucks, Chester, Delaware, Montgomery and Philadelphia Counties, right?

A. Correct.

Q. Okay. And according to you those are counties that RCN intended to enter, right?

A. Yes, that's right.

Q. But out of those five counties RCN only ever built in one of them, in Delaware County, right?

A. Correct.

Q. It never tried overbuilding in the other four.

A. I don't know whether they've tried it, but they've never done it.

Q. They've never done it. They never obtained the franchise for the other four, right?

A. That I don't know. I assume they haven't, but if they did, they didn't follow through with it.

Q. You don't know that they got a franchise for the other four.

A. That's right.

Q. You don't even know if they applied for a franchise in **[Page 41]** those other four?

A, That's right.

Q. And the list of the five counties was taken directly from a document, an OVS certification that we talked about in your deposition. Do you recall that?

A. Right.

Q. And it's listed in your report as the document you're relying on, right?

A. It's one of the RCN documents.

Q. And it's a document that you used to get this assumption that they intended to enter in those five counties, right?

A. Yes, there are actually several, but --

Q. Are you aware of another document? Because I didn't see another one cited in your report.

A. If you'll look in one of the reports there's an OVS application document and there's an intent to enter or intent to -- I've forgotten exactly what the phrase is, but there's another document that's cited in one of my reports.

Q. Okay. Well, let's look at an OVS document which is --

A. Intent to operate, I'm sorry. That's what it is.

Q. Okay. Well, let's look at the OVS document which is the next tab in your binder. It's Tab 14, I believe.

A. Okay.

Q. And this document is dated June 1998, right?

A. That's correct.

[Page 42]

Q. June 15, 1998.

A. Right.

Q. And this is an order granting RCN an OVS certification.

A. Yes.

Q. Do you know what an OVS certification is?

A. I understand it to be an approval of being able to go to certain areas and overbuild.

Q. Do you understand whether it's the same as getting a franchise application?

A. I understand it to be different from a franchise application.

Q. Do you understand that it's an open video system application?

A. Right.

Q. And what that means is that you have got the right to operate as an open video system operator but you have to make your cables available to other people coming in and using them. Were you aware of that?

A. I don't have that depth of knowledge about OVS, no.

Q. Did you read that in Dr. Chipty's report?

A. I probably did if she wrote it.

Q. You don't have any basis to dispute that?

A. None whatsoever.

Q. And you have to set aside according to Dr. Chipty up to two-thirds of your channel capacity

for these other third **[Page 43]** parties to come in. You have no basis to dispute that proposition?

A. Do not.

Q. And Professor Chipty cites articles that OVS became a flop because that would only leave you 15 or 20 channels to run on your own. You have no basis to dispute that proposition?

A. I do not.

Q. And if you look at this OVS certification, this document that you rely on for the proposition that RCN would have overbuilt in five counties, it cites a comment by the PCPA, the Pennsylvania Cable Intellicommunications Association on page 3, paragraph 4, your Honor.

And the FCC notes that the PCPA states that based on the history of the open video system operations of RCN affiliates, RCN Philadelphia certification applications follows the same pattern in choosing large regions within which to become certified with no apparent intent to construct open video service facilities in each listed community in those regions. Do you see that?

A. I do.

Q. And you did not make any further inquiries on whether or not RCN intended to construct OVS facilities in each of these counties, right?

A. That's not correct. As I said, there is an October **[Page 44]** document from this same year in which they filed an intent to operate and named those same five counties and even listed the communities in each of those counties in which they intended to operate.

Q. Dr. McClave, I asked you in your deposition, on page 119, your deposition is there in the first tab.

A. Right.

Q. On line 8.

THE COURT: I'm sorry, what page?

MR. KORPUS: Page 119 of Dr. McClave's deposition.

THE WITNESS: I have the report as the first tab.

MR. KORPUS: Sorry, it's in maybe the fifth tab?

THE COURT: Yes.

THE WITNESS: Which page?

MR. KORPUS: Page 119, line 8.

BY MR. KORPUS:

Q. I asked you, "Do you recall making any further inquiry as to whether or not RCN intended to construct open video systems in each of these five counties?

"Answer: I don't believe I made any further inquiry as a result of that comment, no."

Was that true?

A. It was true at the time of the deposition, yes.

Q. And since then you went back and you found that in October they filed a notice of intent. October of the same **[Page 45]** year, of 1998.

A Yes. Your line of questioning caused me to go back and do further research.

Q. Very good. And after October of 1998 did you find any evidence that they took any steps to enter these five counties?

A. Other than perhaps what they did in Delaware, no.

Q. I'm talking about the other four counties.

A. No. And again --

Q. Just answer my questions, Dr. McClave.

A. No.

Q. You did not find any other evidence after --

THE COURT: The answer is no.

MR. KORPUS: Thank you, your Honor.

BY MR. KORPUS:

Q. Now, Dr. Chipty, did you also investigate following the deposition the assertion of the PCPA that RCN has this history of a filing for OVS applications elsewhere and not following up on it?

A. I did not.

Q. Okay. Dr. Chipty in her report has evidence that RCN applied for OVS applications in Portland, Seattle, Phoenix and Southern Florida, but never actually built those systems. You did not know that at the time of your deposition, as I recall.

[Page 46]

A. No, that's correct.

Q. And you didn't look into it since your deposition.

A. I did not.

Q. Okay. And you have no basis to dispute that today?

A. I do not.

Q. And do you know that as of December 2000, you recall that was about the time that the dotcom balloon burst?

A. That was about that.

Q. And do you recall that the market for telecommunications capital was drying up?

A. I think that's probably generally true.

Q. So do you recall that as of December 2000, or do you know that as of December 2000, RCN announced that it was not going to seek or launch any new franchises or any new OVS certifications because of this tight capital market?

THE COURT: The date again of that announcement, Counsel?

MR. KORPUS: December 2000.

THE WITNESS: I didn't recall a specific date. I do recall that the answer to that question is yes.

BY MR. KORPUS:

Q. Okay. So you recall that the answer to that question is yes.

And RCN ultimately filed for bankruptcy in 2004, right?

[Page 47]

A. They did.

Q. Now, your assumption in your but-for world, is that RCN would have built in these five

counties and that they would have reached 15 percent penetration in those counties, right?

A. At least, yes.

Q. At least 15 percent, thank you. Do you know whether RCN ever reached penetration of 15 percent in five counties in the DMA?

A. In Philadelphia or anywhere?

Q. Anywhere, anytime.

A. I don't know that.

Q. Did you look?

A. I read what I could about RCN, but I didn't look for that particular -- again, I need to make clear, this is an assumption I'm making based on plaintiff's allegations.

Q. And I'm asking you whether the assumption is accurate, the basis for your summary.

A. I understand that you're doing that.

Q. I'm asking you not in Philadelphia, elsewhere.

A. Right.

Q. Where RCN operates. Did you look to see whether they ever reached 15 percent penetration in five counties in one DMA?

A. I did not.

Q. Okay. Let's leave the overbuilding story aside for a **[Page 48]** second.

THE COURT: Before we leave that.

MR. KORPUS: Yes, your Honor.

THE COURT: Doctor, in the material that you received and the material that I received, there was some history that RCN was denied the availability of local sports by Comcast. Do you recall that?

THE WITNESS: RCN?

THE COURT: RCN. You don't recall that?

THE WITNESS: I don't.

MR. KORPUS: Your Honor, could I just address that for a second?

THE COURT: Sure, absolutely.

MR. KORPUS: Because I think the record is undisputed that RCN always had SportsNet the whole time in Philadelphia. I think all the plaintiffs are disputing that they were on short-term contracts rather than long-term contracts.

THE COURT: Okay.

MR. KORPUS: But there is not dispute that they had Comcast SportsNet.

THE COURT: Thank you.

MR. KORPUS: I want to just address briefly, one of those charts.

(Discussion off the record.)

[Page 49]

Q. You testified about this chart in your direct examination and what you said was that, if I may approach, this is the price you calculated, right?

A. That's right, that's the but-for price.

Q. And this is the FCC price in non-competitive areas, this dotted orange line?

A. Correct.

Q. And you took some comfort from the fact that your price was less than theirs, correct?

A. It was between those two lines and --

Q. Right.

A. -- if anything, closer to the non-competitive one.

Q. Let's just make sure what we're talking about. The FCC price, that's just a simple average, right?

A. Yes.

Q. These two lines are simple averages, they do not take into account any demographic factors?

A. Not in a regression model, they do in the sense that it's spanning demography, but they do not adjust for --

Q. They don't adjust for that?

A. -- that's right.

Q. So, to the extent that prices might be higher because of demographic factors, right, that's not controlled for in the model -- in the FCC model?

A. It's not controlled for in the FCC -- explicitly in the **[Page 50]** FCC averages. I believe it is in my model.

Q. That's right. But your model is a regression, their model is a simple average.

A. Yes.

Q. So, we're not really comparing apples to apples here, right?

A. Well, we're comparing a regression line to averages. They are prices. You just have to understand that they're derived in a different manner.

Q. All right. Let's look at your deposition again, Dr. McClave.

(Pause.)

Q. On page 130, I asked you, "Do you" -- right, looking and this is line 19 of page 130. "Let's see if we can agree on this. Do you agree with me that looking at the national benchmark without any adjustments for variables, is not an appropriate benchmark?"

"Answer: I don't believe using a national average price to calculate damages would be appropriate and I didn't do that." And then we go through explaining what the FCC did and then I asked you on page, actually, going back to page 128.

A. Which page?

Q. Page 128. You can see the context that we are talking about the dashed line by the FCC. I said, if you start at **[Page 51]** 127, line 21, "Your green line is controlled for income, right?"

"I would rather say that it takes in account differences in income between the benchmark and the Philadelphia market."

"And it takes into account channel capacity, right?"

"Correct."

"Do you know whether the red dotted line by the FCC takes those two methods into account?"

"I think there's a dashed line, as I understand it, is a simple average price, so it would represent aver-

ages. However, a server represent income and channel capacity. It would not, as I understand it, explicitly take it into account as I have."

"So, it's not quite an apples to apples comparison, right?"

"It's not a regression model to regression model comparison, that's right."

Do you agree with those answers?

A. I think that's what I just said.

Q. Okay.

A. Yes, I do agree with those answers.

(Pause.)

Q. All right, I want to go now and talk about discounts and I want to talk about the prices that you used in your model.

[Page 52]

MR. KORPUS: Your Honor, are you comfortable with me moving on?

THE COURT: Yes, you may move on.

MR. KORPUS: Thank you.

Q. Now, in your model, you used the Comcast list price, right?

A. That was my attempt, yes.

Q. And the price you used to work out the overcharge does not take any customer discounts into account, right?

A. The comparison is list price to list price.

Q. Yes or no, the price you used to work out the overcharge does not take any discounts into account?

A. That's right.

Q. Okay.

A. Not explicitly.

THE COURT: Well, what's the, what am I to make out of the limitation, not explicitly? Implicitly does it.

THE WITNESS: If one assumes, as I do, that discounts are discounts off of list price, then it does.

MR. KORPUS: Well, I don't understand what that means, your Honor. I don't know if your Honor understands what that means.

THE COURT: Well, you have to --

MR. KORPUS: But --

THE COURT: -- field further questions, go to it.

[Page 53]

MR. KORPUS: I'm going to field questions, for sure.

Q. When you are looking at the price paid by a customer, whether in your benchmark sample or in your Philadelphia sample, you are looking at the list price in the county, right?

A. That's absolutely true.

Q. Okay. You are not looking at what that customer actually paid, right?

A. I understand the list price to be more than 80 percent of the customer's paid list price.

Q. Not, I'm asking about -- so, to the extent that the customer received a discount, you are not capturing the actual price paid by the customer, right, in your model?

A. In the model, that's right.

Q. Okay. So, when you work out the overcharge and the suggested impact of the allegations, you are not looking at the prices actually paid by those customers who received discounts?

A. That's right, the explicit calculation does not take those into account.

Q. Okay. And you would agree with me that over the class period, an average of 20 percent of subscribers received discounts off the list price, right?

A. Approximately, yes.

Q. Okay.

[Page 54]

A. At some point in time.

Q. At any one point, no, I'm sorry -- if you average it all out, 20 percent of the customers received discounts over the class period?

THE COURT: Averaged out over the period?

MR. KORPUS: Yes, over the class period.

THE WITNESS: Actually, we know 2003 to 2008, so, it's that part of the class period.

Q. That's right, your model is only '03 to '08, that's absolutely correct. So, between '03 to '08, we know that an average of 20 percent of the customers received discounts. And we know that it was more than that towards the end of the class period, less

than that in the beginning of the class period. That's fair, right?

A. That is.

Q. And you were given information about the discounted prices, you had them, right?

A. We had some information about discounts.

Q. Right. But you chose not to take them into account in your model?

A. That's right.

THE COURT: Why?

THE WITNESS: Your Honor, our investigation indicated that the discounted prices were, for the most part, temporary. I need to back up one step. We looked at one **[Page 55]** month, the database was extremely complex to figure out what prices were. We looked at one month, each year and I think Dr. Chipty did the same thing. July, midpoint of the year to represent the price for the year. When we looked at discount prices in there, I think I mentioned this during direct, there were, for example, zeroes. And we did enough investigation on previous months to know that those weren't real zeroes, they were carry-over from --

THE COURT: Somebody bought a package and paid for it up front.

THE WITNESS: Yes, multi-month. So, to use those, there were other prices, that were not zero, that would have phrases beside them, LTD-PRO, which we took to mean limited promotions. And we'd look for several months and those would go away. So, to get a true picture of price and what was happening to the price, we felt as all of these papers that

he cited today, also feel that the only way you're going to get a true picture of price is list price. And there is an assumption, your Honor and I've stated it many times, that these discounts are limited in nature and that they're off list price. So that, if the list price were elevated, the discount prices would have been elevated. There is an assumption in my analysis to that affect.

Q. You mentioned limited promotions. So, some of these discounts were limited promotions for a period of time and **[Page 56]** then that customer doesn't get them any more?

A. Right.

Q. But other customers come in that do get the limited promotions, right?

A. I presume that's true.

Q. Okay. And you mentioned the zero, so there might be a situation where you would see a large price in one year, which is only one month, which is paying it all up front. And then zero for the next few months, something like that?

A. That's what it looked like, yes.

Q. Okay. But if you took an average, it would take all of that into account, right?

A. Not if you're going to try to use a snapshot of one month a year, which is what we did and what we were really forced to do.

Q. But if you're going to look at an average to look at -- if you want to look at the average price paid by people in this cluster, it would catch it in?

A. No, I disagree. I don't think you could capture that by looking, by trying to take a snapshot of one month a year.

Q. But you know that there's also, other than this zero issue, you know that there's plenty of other discounts there that seemed like actual discounts, whether they be limited for a period of time or not, that you just ignored, right?

A. Well, no, we didn't ignore them. We looked long and hard **[Page 57]** at these data and it was not easy to figure out what these prices were. So, we asked Comcast what's on the rate cards? Answer, list price. We asked Comcast how should we calculate a rate card price using your database? They said there's no simple way, most of the time, you use the model price.

Q. Comcast told you that?

A. In our conversations, that's what they told us.

Q. Okay.

A. Absolutely.

Q. Who told you that?

A. There were many conversations. I don't recall names. I'm telling you that it was a long process and we were trying to match rate card prices to prices in the electronic database. We believe that process worked.

Q. Okay, I understand.

A. But we were trying to get list prices.

Q. But you're also trying to calculate impact here, right and overcharge and damages, right?

A. Absolutely.

Q. Okay. And if I am a Comcast customer and in one year, I received a discount that's, let's say, 30 percent off the price and you are overcharge is ten percent. I was not impacted during that year, right?

A. I can't agree with that. If you would have obtained a 30 percent discount off a lower price, you were impacted. **[Page 58]** That's the whole concept of discounts being a percentage off of some list price, so, you were impacted.

Q. The way you're calculating your model, Dr. McClave, is you're looking at the benchmark counties versus Philadelphia counties. And you're saying there's a difference, I think your average is 13 percent, was that the average overcharge?

A. I think 13 percent is the average overcharge.

Q. Okay, so, prices in Philadelphia are 13 percent higher than prices in the benchmark and you're saying, uh-huh, those impact, there's a 13 percent difference. But if, in fact, the price that I paid in Philadelphia is not the list price that you used to calculate the 13 percent, it is some discounted price, maybe 30 percent less than that list price. Using that same calculation, I am not impacted, you would not be showing an overcharge, right?

A. There are two points of disagreement in your question. Number one, I didn't just compare the benchmark price to the Philadelphia price. I adjusted the benchmark price so that it was comparable to Philadelphia.

Q. Okay.

A. And then I make the comparison.

Q. That's fine.

A. Number one. Number two, if one is assuming that discounts, by definition, are discounts off a list price and if the list price is elevated, then the discount price is **[Page 59]** elevated. So, those people would be damaged. It's only if you're going to assume that discount prices are made up out of the thin air, that that's not true.

Q. But mathematically, there would not be an overcharge there, right?

A. No, I disagree with that. If you lower, if you lower the list price by ten percent, to make it easy and then you take 30 percent off of that lower price, you're going to get a price that's lower than if you take the 30 percent off the higher.

Q. Oh, I see what you're saying. I see what you're saying. But for the purposes of calculating the overcharge, in this case, your model did not capture any of those discounts. This analysis that came up with the 13 percent, did not capture the affect of those discounts?

A. The 13 percent is based on a comparison of list pricing.

Q. Okay --

A. That's true.

Q. -- I understand that. Now, let's just show his Honor how it works, because I think this will be helpful.

THE COURT: So that, excuse me a second. So that, there's not commonality with respect to the two classes of customers that we're talking about. One who pays the list price and one who pays the dis-

count. There is impact, but the measure of that impact, but you can't establish the **[Page 60]** measure of that impact using the common evidence that you're presented, using a model that you've presented to those customers who are discount people?

THE WITNESS: I think you could, your Honor, if you did the math as I just explained.

THE COURT: Explain that.

THE WITNESS: Okay, so, let's take a price. Let's take a $50 price and let's suppose that we're saying ten percent is the, is the overcharge. So, the but-for price is $45, these are list prices. And let's suppose that that customer is getting a five percent discount, okay. So, that would be $47.50, I believe. I'm probably making this math harder than I need to.

MR. KORPUS: I'm sorry, I just -- $45, you go to $47.50?

THE COURT: We started at --

THE WITNESS: Fifty bucks.

THE COURT: -- fifty bucks.

MR. KORPUS: Okay.

THE COURT: It should have been $45, ten percent less.

THE WITNESS: Ten percent is the but-for price.

THE COURT: That's the but-for price.

THE WITNESS: $45.

THE COURT: All right.

[Page 61]

THE WITNESS: Now, we've got this discount customer, who is getting a five percent discount and he's paying $47.50.

THE COURT: Okay.

THE WITNESS: Okay. If that is a discount off of list, then he would have paid five percent off of $45, not five percent off of $50. And so, there still would be impact and it still could, the model could still be used to do that. That's the concept of using list price as the benchmark, is that discounts are off of list.

Q. But your model does not do that. Your model does not take these discounts into account?

A. It does.

Q. No, we've just been through --

A. Well, when the damages are calculated, it's against the revenue that includes people who got discounts.

Q. When the damages are calculated, I understand. But for the purpose of working out the overcharge, the model, the output of the regression does not include the discounts?

A. Right. Your Honor, the ten percent example I gave you, it would be ten percent for both. That's the --

Q. Let me --

A. -- and it's based on an analysis of list price.

Q. All right. Let's show his Honor an example, because I think this will really put some light on this. Can we put up **[Page 62]** -- and your Honor, you have the document in the next pad.

THE COURT: Where are we? 13?

MR. KORPUS: Yes, let me just move into evidence the previous table, which I believe was the OVS certification for RCN.

THE COURT: What's the exhibit number?

MR. KORPUS: D-7.

THE COURT: D-7 is admitted.

(Defense Exhibit 7 admitted in evidence.)

Q. And it's Exhibit 8 we have there, this report. Is that Exhibit 8 in your copy, Dr. McClave?

THE COURT: Seventh Annual Report.

THE WITNESS: I'm sorry, what are you looking for?

MR. KORPUS: I'm sorry.

THE COURT: D-8 is the FCC Seventh Annual Report.

THE WITNESS: Tab 15, Exhibit 8, Tab 15, right?

MR. KORPUS: I'm sorry, your Honor, my problem. I want to look at Tab 17.

THE COURT: Tab 17, got ya, okay. Tab 17 is D-10.

MR. KORPUS: D-10, thank you, your Honor.

THE COURT: And we'll admit D-10.

(Defense Exhibit 10 admitted in evidence.)

MR. KORPUS: Thank you.

Q. And D-10 is one of these Comcast pricing reports, it's called the VB report, that shows the

prices, the various **[Page 63]** prices charged by Comcast in an area, right?

A. Right, this looks like an AMDOCS report to me.

Q. And AMDOCS report, these are the reports that you got your prices from for your model?

A. Well, we had an electronic version of this.

Q. Right, but this is --

A. Yes.

Q. -- this is the data you used?

A. This is part of the data that we used.

Q. Yes, this is part of the data you used and this particular one is for one area, Area 1 or 2 in Bucks County, which is this -- this alleged cluster, right?

A. Yes.

Q. Okay. You've called Area 1 or 2 and it's dated July 31, '08. Now, the prices you looked at for expanded basic and those are on page three of this document, your Honor.

THE COURT: Okay.

Q. You see the heading, Extended and it's Code 23. You agree with me those are the prices charged for expanded basic, right?

A. No.

Q. You do not agree with that?

A. No. That's, you know, this is a perfect example of how you have to be so careful.

Q. Okay.

[Page 64]

A. You have to add this to the basic price --

Q. You have to add this to the limited --

A. -- to get the expanded basic --

Q. I agree, but I'm talking just about the unregulated B-2 element of the price, okay?

A. Okay.

Q. I mean, that's the price that you modeled, right?

A. No.

Q. You modeled B-1 and B-2?

A. I modeled what people actually paid.

Q. All right.

A. Nobody paid these prices that you're pointing to right here.

Q. Okay.

A. These were part of the service.

Q. But when you decided which part of this -- of the expanded basic to include in your calculation --

A. Right.

Q. -- you look at the prices on the right and then the numbers, in the second column, tell you how many people in the area subscribe for the service at each rate, right?

A. Well, again, it tells us the number of subscribers that are paying --

Q. Right.

A. -- that price for that part of their service.

[Page 65]

Q. I understand.

A. Okay.

Q. That's right and looking at this, you would choose $37.80 because 1,664 customers are paying $37.80 and that's the mode?

A. Right.

Q. And that's the part that you would take into your calculation, add to it the B-1 and the Value Pak and that's your price for this area at that time. That's how you would do this?

A. It's likely that you're right. We would probably also try to look at the rate card to make sure we're right, but --

Q. Right.

A. -- that's right.

Q. I'll tell you that I looked at $37.80 was the price that you picked here, okay and you think that's consistent with how you would do it?

A. Now, wait a minute. You looked at the $37.80 price and that's what we used for a total or --

Q. No, just for this spot.

A. Okay.

Q. Just for this spot.

A. Okay.

Q. Okay. So, because the most number of people pay $37.80, that's what you chose for this part of the price. Now, **[Page 66]** there's also, if you look below, your Honor, 1,429 people that are paying a lesser price of $23.35, do you see that?

A. I do.

Q. You did not, in any way, in your model capture the affect of those people, right?

A. Absolutely not. They're part of Triple Play.

Q. That's right, they're part of Triple Play --

A. Yeah.

Q. -- that's absolutely right.

A. Right.

Q. They're getting a discount.

A. Well, they're paying $33.00 for a Triple Play, which is not an expanded basic service.

Q. Okay.

A. That's not what we're trying to capture.

Q. But the Triple Play is telephone, internet and cable service, including expanded basic, right?

A. Right.

Q. Okay. So, they're paying for the video part of it, $33.00, that's how the company treats it, right?

A. That's how the company treats it.

Q. Okay. And you have no --

A. The customers --

THE COURT: Let him finish his answer. That's how the company treats it, but?

[Page 67]

THE WITNESS: But the customer is paying $99. There's no breakdown there. If the customer decides I want to drop back to expanded basic, guess what he

gets to pay? Whatever the $37.80 is plus the B-1 price.

Q. But those customers have decided to pay $99, but are getting a lot more for their money. They're getting internet, they're getting phone, right?

A. Getting more for their money is, I suppose, an individual decision. But they are getting other services beyond expanded basic, that's for sure.

Q. Right and for the video, they are getting a discounted rate for the video element. That's how they viewed it or they wouldn't do it.

A. Well, again, Comcast could put ten dollars in here. Comcast could put any number in here such that it ends up adding up to $99.

Q. Well, did you try to allocate expanded basic -- to allocate Triple Play between the three elements?

A. I did not. Triple Play as I --

Q. You just --

A. -- understood it, was not part of what I assigned to look at. I understood that I was assigned and that the class was defined as the customers taking the expanded basic service.

Q. Okay. So, your understanding is that customers that are subscribing to Triple Play are not included in the class? **[Page 68]** Can I have a stipulation to that from counsel?

A. I do not have an understanding that the price that they are paying is something that represented expanded basic. Whether they are in the class or not, I think, is certainly a legal decision.

They're certainly not paying a price that I can identify that is their expanded basic price.

Q. Well, they're in the class, then don't you need to capture what it is that they are paying? And if that's the case, you didn't do so, right?

A. That's true. I don't know what they were paying.

Q. Do you know how many people, today, in the Philadelphia market, choose to have Triple Play?

A. I do not.

Q. Would it surprise you that about a third of the subscriber basis, also, is subscribing to packages?

A. No, that wouldn't surprise me.

Q. Now, there are other discounts here other than the Triple Play, right, there's other numbers here showing 108 people paying $20 and then, you know, various other numbers, at prices less than your -- the price that you chose and you don't take them into account, even if it's not part of a Triple Play?

A. Well, and again, one has to ask the question, what does that get added to? That's just part of a package. So, if you look, your Honor, down under 16 on the next page, page **[Page 69]** two, there are a whole bunch of basic prices, as well. And so, again, what do you match it up with? And I think it's the reason that myself and every other researcher that's looked at this, says the only way to make sense of this is to look at list prices and that's what I did.

Q. Those other researchers are not trying to calculate damages and impact, right?

A. That's a true statement.

Q. Okay. You are?

A. I am.

Q. Okay. Now, but just answer my question. I'm not asking for the reason why you did or didn't do it, I'm just trying to establish that you didn't do it, other than the Triple Play, there are other discounts shown on this page, that did not go into your model, right?

A. That's right.

Q. Okay. And so that's what you did when you had the model price and you had other people taking lower prices, discounted prices.

A. Right.

Q. Now, you also added a screen -- I think I did move this into evidence, your Honor. But I move it in.

THE COURT: What's the exhibit number?

MR. KORPUS: Ten.

THE COURT: It's admitted -- it's been admitted, **[Page 70]** yes.

Q. Now, let's talk about how you picked the model price and let's look at another example, another report. Let's look at Exhibit 11, which is the next tab in your binder. Now, it's true, Dr. McClave, is it not, that you added a screen for picking your model price?

A. Yes, we definitely had some screens to try to make sure we were getting a list price, yes.

Q. Right, but let's see what that means. What you did is even if the most common price, like the one that you picked in the last example.

A. Right.

Q. Even if the most common price was more than 25 percent lower than the year before, you didn't take that price, you used the next most common price?

A. If the model price dropped by more than 25 percent, what we typically did was say, let's look at the rate card, see what it says is the standard price and more often than not, it would agree with the second most common price and that's what we used.

Q. Okay, yes.

A. So, we definitely, if we saw a 25 percent drop in list price, we didn't believe it.

Q. Right, you didn't believe, you did not capture the new list price, the new price that most people pay? That you did **[Page 71]** not capture the new prices paid by most people in that area, you went to the second one.

A. Yes, that's right.

Q. Okay.

THE COURT: Hold on a second. You went to the rate card and the rate card showed a price that was lower than the first price in the information that you had?

THE WITNESS: No, sir. In every case that we were able to check, when we saw a significant drop in price, when we went to the rate card, it didn't have that drop. It, like every other year, went up.

THE COURT: So, you used the money in the rate card?

THE WITNESS: Well, we went back to the database --

THE COURT: Okay.

THE WITNESS: -- and said is there a price in there that matches the rate card? And in that case, what Comcast had told us wasn't -- didn't hold. That is, that the most common price was also the rate card price. It would typically be the second most common price and so, that's what we'd use. Again, the --

MR. KORPUS: I'm going to go through an example to illustrate that for your Honor.

Q. But just so I understand, when you're looking at the rate card, that's a price list. That doesn't tell you who's paying what, right?

[Page 72]

A. That's right.

Q. That doesn't tell you that -- that's paid by most people or second most people or whatever, that's just a list of prices?

A. Well, it says, here's what the standard, basic -- expanded basic service is going for. It's a list price.

Q. It's like me walking into a car dealership and seeing a list price, right, but that's not what most people pay when they buy a car, right?

A. You get to see the list price, I don't know that the cable customers get to see the rate cards.

Q. Okay.

A. But the rate card is a list price --

Q. Right.

A. -- to my understanding.

Q. Now, let's look at this example and explain and just show his Honor what happened here. So, if we look at the first one, which is Tab 18, Exhibit 11, that is for Area 321, a VB report for July 31, '07, right?

A. Yes.

Q. Okay. And again, let's turn to the second page, which shows expanded basic. And here, the price you would have taken for this part and I'm saying just this one part of your -- the price that goes into your model, would be $36.55, because that was taken by most people in this area by 163 in [**Page 73**] '07?

A. That would --

Q. That's how you would do that?

A. -- that would have been our initial pool of prices --

Q. Okay.

A. Before we went and checked against rate cards.

Q. Okay. So, let's put that to one side and I'll move that into evidence, your Honor, is Exhibit 11?

THE COURT: Yes, 11 is admitted.

(Defense Exhibit 11 admitted in evidence.)

MR. KORPUS: And I'll move 12, as well, while I'm at it.

THE COURT: 12 is admitted.

(Defense Exhibit 12 admitted in evidence.)

Q. And then, let's go to 12, which is then next -- the price report, the VB report for the following year, for the same, exactly same area.

A. Okay.

Q. And what we see now is that the price -- Comcast lowered its prices substantially. We see that the 126 people paid $23.35 for this service, right? 126 people paid $23.35 and 126 is the largest number you see in the column of number of people, right?

A. I agree with everything you said except Comcast lowered its prices substantially. That is part of a Triple Play. **[Page 74]** That is not the expanded basic.

Q. That's part of the Triple Play package and 126 people took the Triple Play package and for those people, Comcast allocates $23.35 to video?

A. Yes.

Q. And the way, the way Comcast allocates between the three packages, is just a third, a third, a third, right?

A. I don't know. I know it, for this period of time, was allocating $33 out of $99, so, that's a third.

Q. A third?

A. I don't know what it does with the other parts.

Q. So, they didn't do any fancy jiggering here, they just took $99 for the package and said a third goes to phone, a third goes to internet, a third goes to the video service?

A. Apparently.

Q. Okay. And you do not take the price of $23.35 in your model, even tough it's taken by most people, by 126 people. Instead, you default to the second one, which is $37.05, which is taken by only 84 people. That's how you would handle this, right?

A. I would and then I would check it against the rate card to be sure I'm right.

Q. Right, to make sure that that's what the rate card shows. But all the rate card tells you is that's the rate card, that's how much -- that's the price list. It doesn't tell **[Page 75]** you how many people take it and what they actually pay?

A. That's right.

Q. Okay. Now, you know, by the way, that you read Dr. Chipty's reports and I see you are familiar with them?

A. I have, yes.

Q. Yes. And you know that Dr. Chipty took your report, as it stands there and added population density to it and then allowed for the affects of discount and showed that that did not show impact in every county in every class year. You read that portion of her report?

A. I did and that's where she was including zero prices, for example, in her weighted average.

Q. Right. She did an average pricing. So, if it's -- and you don't have a problem with the calculation itself, you agreed that's what the model shows?

A. I don't recall whether I agree with that or not.

Q. Okay, okay. But, in other words, if his Honor accepts -- if his Honor accepts that this model

should be adjusted for population density and he accepts the way that Dr. Chipty dealt with prices, to allow for discounts. I want you to assume those two things. Then you have -- you have negative damages, according to Dr. Chipty, in some counties and in some years, right?

A. It's certainly possible.

Q. Okay. And if you have negative damages for some **[Page 76]** counties, in some years, allowing for those two variables, then you haven't show impact for those counties, in those years, right?

A. If that were to happen in a legitimately modeled way, then I would agree with that.

Q. Okay. Let's move on to the B-1 issue and I'm not going to dwell too long on this, because I'll let Dr. Chipty explain it better than I can. But I just want to make sure that we're all on the same page. Dr. Chipty did not change -- may I just approach?

THE COURT: You may.

Q. Dr. Chipty did not change any of these variables here, to do that calculation, right?

A. That's right.

Q. Okay. All Dr. Chipty did here is put in the B-1 process, right?

A. All she did was change an important variable in the model.

Q. All Dr. Chipty did is model the affect of all of these variables on B-1, right, that's the value I put in it?

A. It's what she did.

Q. It's what she did.

THE COURT: Wait, wait, wait. Let me have that again, what did she do?

THE WITNESS: She changed the dependent variable, **[Page 77]** your Honor --

THE COURT: Okay.

THE WITNESS: -- to the regulated price instead of what Comcast charges.

THE COURT: Was that a change in approach, in the methodology? Tell me about what that changes? Go ahead, you can pursue it.

MR. KORPUS: Either way, your Honor.

THE COURT: You pursue it.

Q. But what Dr. Chipty was trying to test is whether -- in the test on your model to see how these variables, which you say show a difference for the price between the benchmark counties and the Philadelphia counties. As a test, she tried to see whether just applying the same variables would also yield a difference for the regulated price, the price set by regulators in the benchmark counties and the Philadelphia counties. That's what she did?

A. That's what she did.

Q. Okay. So, she took the B-1 rate and there's no dispute about what the B-1 rate is, the authorities tell you what to charge for B-1, right?

A. They tell you a maximum value that you can charge.

Q. They tell you the maximum you can charge. So, she took whatever is the maximum that can be charged, by law, for B-1 and she used your variables and it yielded a big affect. It **[Page 78]** yielded an affect that showed that in the benchmark counties,

right, prices were -- was it 11 percent? 13 percent in the benchmark counties prices were 13 percent lower for B-1 than the regulated rate in Philadelphia, when just using those same variables that you used. That what it shows, right?

A. That's what she did.

Q. And you don't have a problem with that math, right? That math is accurate?

A. Oh, I have a problem with the approach. If you're saying can you make a computer do anything, no, I don't have a problem with that.

Q. Did you check it to make sure that's what it shows?

A. Yes.

Q. And that's what it shows?

THE COURT: You're talking about the math? We're talking about just the math?

MR. KORPUS: Yeah, yeah.

THE WITNESS: As opposed to the model.

THE COURT: Right.

MR. KORPUS: Yes.

THE WITNESS: Yes.

THE COURT: Math is right, model is wrong?

MR. KORPUS: According to --

THE COURT: According to this witness.

MR. KORPUS: I understand. But the model is just an **[Page 79]** illustration, that's what she was doing. Now, I asked you about this in your deposition.

THE COURT: Well, Doctor, when you said the approach is wrong, what do you mean by that?

THE WITNESS: Your Honor, I actually prepared an exhibit that illustrates this, if I may?

THE COURT: Sure, absolutely. Go do it now, Mr. Goldberg has it for redirect anyhow, so, we'll just do it now.

(Discussion off the record.)

MR. GOLDBERG: If your Honor will allow me and I know we're in the middle of Mr. Korpus' cross-examination, but I'll get the exhibit number we assigned to this and put a sticker on it.

THE COURT: What's this, yes, what is this exhibit?

THE WITNESS: Do you want me to start explaining?

THE COURT: Yes.

THE WITNESS: Okay.

THE COURT: Something you did?

MR. GOLDBERG: This is not admitted.

MR. KORPUS: If it's not admitted, I'm in the middle of my cross.

MR. GOLDBERG: This is one of the two that were withdrawn from the folder your Honor had yesterday.

THE COURT: Okay, hold it back. I don't want to **[Page 80]** interrupt his cross. You can --

MR. GOLDBERG: All right, I'll do it on redirect.

THE COURT: -- address it on redirect and we'll see where we are at that point.

MR. GOLDBERG: Sure.

BY MR. KORPUS:

Q. So, all Dr. Chipty found was that if you just take regulated rates and as a test to see whether your approach is sound and you applied that approach, those variables, to just the regulated rates, the regulated rates come out to be so much higher in Philadelphia then they are in the benchmark set, that's what she found, right?

A. That's what she found.

Q. Okay. And I asked you about this at your deposition and you told me that all you take from that is that regulators are one place and doing something different from regulators in another place.

A. I said that was one possibility.

Q. Okay, but you don't have -- if the purpose of this model, the purpose of this model is to estimate the impact from the alleged anti-competitive conduct, right?

A. Yes.

Q. That's the purpose of this model?

MR. GOLDBERG: I object, which model are we talking about?

[Page 81]

MR. KORPUS: I pointed at Dr. McClave's --

THE COURT: The doctor's model.

MR. KORPUS: -- model on the wall.

MR. GOLDBERG: We're not talking about Dr. Chipty's model?

THE COURT: No. The purpose of this model meaning Dr. McClave's model.

MR. KORPUS: Right, Dr. McClave's model, that's the purpose of the model.

THE COURT: Right.

THE WITNESS: Yes, using the expanded basic price.

MR. KORPUS: Yes.

THE WITNESS: Just to be clear.

MR. KORPUS: Yes, I understand that.

BY MR. KORPUS:

Q. And Dr. Chipty shows that there is a large variance between the benchmark and the Philadelphia prices, applied these variables for the regulated rate. Now, you have no reason to believe that the regulators in Philadelphia are engaged in anti-competitive conduct against the class, vis-a-vis the regulators in benchmark counties, do you?

A. Since her results are meaningless, I have no reason to believe that.

Q. Okay, you have no reason to believe it. The final subject I want to cover with you today, Dr. McClave, is some **[Page 82]** of the criticisms of Dr. Chipty's model and you know, I'm going to let Dr. Chipty speak for herself, but I just want to cover the highlights and we can move on with the hearing.

THE COURT: These are Dr. McClave's criticism?

MR. KORPUS: Of Dr. Chipty's --

THE COURT: Very well.

MR. KORPUS: -- of the stuff Dr. Chipty did.

Q. And let's just get something straight that I think there was a bit of confusion, that I think this will help your Honor. When you were talking about what Dr. Chipty did in terms of using Fact Book and things like that, Dr. Chipty did not specify a damages model, right? That's not something she did in this case?

A. I disagree with that in the sense that she, in a number of places, says if you do this, damages would go away or damages would be negative. So, I don't know what to call those models other than damages.

Q. No, those are models that take your model and then add certain variables and look at the affect on your models. But the model that she did, let me just finish, the models that she did using Fact Book, are not damages models. But when she didn't take your damages model and put in the fact book prices, right, she did not do that?

A. I don't remember whether she did or not.

Q. Okay.

[Page 83]

A. But there were a number of Fact Book models that I understood were to measure impact.

Q. But the damages models, those Fact Book models didn't come out at the end and say, there has been an overcharge of x and damages should be Y. That's not what those models did?

A. She didn't do the final multiplication for this.

Q. Those models that she did, using the Fact Book, were just trying to show relationships between clustering and prices and clustering and over-building. That's what those models were?

A. Mr. Korpus, let's be clear here. There are models in there that have a dummy variable, an indicator variable for Philadelphia.

Q. Yes.

A. That is one way of measuring overcharge.

Q. Right, she --

A. So, to say that none of those would be classified by some as overcharge or damages models is simply incorrect.

Q. No, I'm not -- she was not putting those forward as her calculation of damages. She was trying to show the relationship between clustering and price and over-building and price. That's what those models show.

A. In my view, she was trying to make --

Q. All right.

A. -- the difference between prices in Philadelphia and **[Page 84]** elsewhere go away.

Q. All right.

A. That's what she was doing.

Q. And she used the Fact Book for those models, which were, for the most part, in her earlier reports, right?

A. Right.

Q. And those --

A. I'm sorry, even in her fourth report, there's still Fact Book in it.

THE COURT: Well, you better tell me what the Fact Book is.

MR. KORPUS: Your Honor --

THE COURT: I have a little glossary of terms I write down.

MR. KORPUS: -- that would be very helpful. I would like a copy of that at the end of the hearing, your Honor.

THE COURT: Fact Book, okay, what does that mean, Dr. McClave?

THE WITNESS: It is, we discussed this. The Warren Communications publication --

THE COURT: Okay.

THE WITNESS: -- where they survey the cable companies and ask at the franchise level, what are you charging, what's your list price, at the franchise levels.

THE COURT: We did discuss this, I do remember that.

[Page 85]

THE WITNESS: And it's the one that --

THE COURT: Okay, thank you.

THE WITNESS: -- is greatly in error.

THE COURT: I do remember now.

Q. And the Fact Book is used commonly by people in the industry, academics and such, right, do you know that?

A. I do know that.

Q. Okay. So, if people in cable often look to the Fact Book for studies that they do, right?

A. They do.

Q. Right. And the reason is that the Fact Book gives you information, for example, it gives you information here for the whole class period, right?

A. Yes.

Q. There are prices there going all the way back to the beginning of the class period. The sample you used, the Comcast prices, was only available from '03 to '08, right?

A. Correct.

Q. So, that's one benefit of using the Fact Book. The Fact Book, you recall, I asked you whether you looked at prices in the class to apply to the class period and you told me I didn't have the information?

A. Right.

Q. In fact, if you use the Fact Book, there's prices there from before the class period, too, that you could look at, **[Page 86]** right?

A. Mr. Korpus, I already knew that 90 percent of the Fact Book prices --

Q. Dr. McClave, please just --

A. -- were wrong.

THE COURT: Hold on a second. Let him finish his answer.

MR. KORPUS: Well, his answer was almost done.

THE WITNESS: By the time you asked me that, I knew that 90 percent of the fact prices were incorrect. Of course, I didn't use them.

MR. KORPUS: Okay, move to strike, your Honor, non-responsive.

THE COURT: All right, we'll strike it. Next question.

Q. That wasn't my question. My question was the Fact Book contains prices for going back before the class period, right?

A. Correct.

Q. Okay. So, it also allows you to look at that and do that comparison from before class period to after class period. And the Fact Book, the information you had, had only Comcast prices, that's what you were given, right?

A. That's right.

Q. And the Fact Book contains, not just Comcast prices, but **[Page 87]** prices for all the other operators in the area, right?

A. It does.

Q. The other MSOs, the DBS, all the other players in the industry, right?

A. I don't remember whether it has DBS prices --

Q. Okay.

A. -- but certainly other MSOs.

Q. It certainly has other MSOs.

A. Right.

Q. So, if you were trying to compare prices against a sample, it will tell you, not just what Comcast is charging, but also what other MSOs are charging?

A. It would have prices for that.

Q. Right. And if you are trying, for example, to look at the affect of Comcast buying a company and what happened to the prices, you could look in the Fact Book, with all its limitation and it will tell you the prices that were charged by the company before and then you could look at it and it would tell you the prices that are charged by Comcast today. That information is also in the Fact Book, right?

A. The prices are in there. I, obviously, do not believe you'd get an accurate comparison.

Q. I understand that. Now, you know that Dr. Chipty repeated in models, which she did using the Fact Book, using the same data that you did, right?

[Page 88]

A. Not quite. She used averages for the most part, including things like zero and negative numbers.

Q. Okay, other than the dispute about prices, but we're talking about data source --

A. Right.

Q. -- she put aside the Fact Book prices. She took the Comcast prices that you used and she put them in a model and she used them, right?

A. She used the Comcast database.

Q. The Comcast database and she says in her report that it had no affect. It gave her exactly the same results, right?

A. That's what she says.

Q. Okay.

A. I don't find that to be true.

Q. Oh, you don't think she got the same results?

A. I do not.

Q. Okay. Well, we'll let Dr. Chipty talk about that. But she also responded to some of your other criticisms that you said, you know, she didn't include. You said she shouldn't include the Chicago and Boston classes, because that was also subject to the alleged conduct. And she repeated the analysis without the Chicago and Boston class and she said she got the same result, right?

A. I don't recall that exactly.

Q. Okay, you don't recall.

[Page 89]

A. No.

Q. Okay. But in any event, she certainly did repeat the analysis using non-Fact Book stuff?

A. She used some analysis with non-Fact Book data.

Q. Okay.

MR. KORPUS: I have no further questions, at this time.

THE COURT: Thank you.

MR. GOLDBERG: I have some short redirect.

THE COURT: Redirect, very well. Do you need a five-minute break?

MR. GOLDBERG: Yes, I'm an older man.

THE COURT: Absolutely, sure okay. We'll take a ten-minute recess.

THE WITNESS: Thank you, your Honor.

THE CLERK: All rise.

(Court in recess 11:26 to 11:44 o'clock a.m.)

REDIRECT EXAMINATION

BY MR. GOLDBERG:

Q. I have some, I hope, short redirect, Dr. McClave. I'm going to go backwards. I think the last thing we talked about was referred to as Dr. Chipty's B-1 model. Do you recollect talking about that with Mr. Korpus at towards the end of our cross-examination?

A. Yes, I do.

[Page 90]

Q. In her reports, Dr. Chipty refers to it, from time to time, as applying your model to be wrong prices, do you recollect that?

A. I do.

Q. When Dr. Chipty put these variables, that is, the variables on the right-hand side of the equal sign, not on your dependent variable, but on a different dependent variable. In this case, B-1 prices, is that your model?

A. It is not my model.

MR. KORPUS: Objection, your Honor, leading.

THE COURT: Tell us whether or not that's your model.

THE WITNESS: I'm sorry?

MR. GOLDBERG: That's what I asked, your Honor. I said tell --

THE COURT: Tell us whether or not that's your model?

THE WITNESS: No, if you change the most important variable in the model, it changes -- it's somebody else's model. I don't expect this model to estimate prices other than the expanded basic prices. If you changed the price to the regulated price, then I would expect other variables to be important and so, it's not my model.

BY MR. GOLDBERG:

Q. Okay, let me ask a couple more questions. Dr. Chipty and **[Page 91]** Mr. Korpus, in his cross-examination, said what she was doing was testing your model against B-1 prices. If Dr. Chipty took these variables that you used and the weights that you used on the right-hand side of the equal sign and put it on a different price, in this case, basic price, was that testing your model on basic prices?

A. No. Not testing it, at all.

Q. Would you expect, if you were specifying a model to estimate basic prices, would you expect to have those same variables and those weights on the right-hand side of the equal sign?

A. I would not.

Q. Would it be correct methodology to determine an appropriate estimate of B-1 prices, to use

those variables and those weights on the right-hand side of the equal sign? And by those, I mean the variables and weights that are on Exhibit 57, if I can read my own handwriting.

A. It would not, Mr. Goldberg and even if the weights changed, that's still not going to help, because the variables should -- have changed, too. So, I think she actually allowed the weights to change, but the variables need to change. It's just not, that doesn't make any sense to think that you can model a totally different price, determined in a totally different manner, that's going to have the same model specification.

[Page 92]

Q. In one of his questions of you, talking about the B-1 model, you said I think I have an exhibit to explain something and there was some colloquy and then, ultimately, you went back to the stand. When you teach the students, you often say, on cross-examination the witness does not have to explain things because you get to do it on redirect. So I'm going to do that. Do still -- would it be -- do you still think it would be helpful to explain to the Judge the problems that you see with Dr. Chipty's B-1 model to make reference to that demonstrative exhibit?

A. I do, that's why I prepared the exhibit.

Q. Right. Then let's do that, Dr. McClave.

(Pause.)

Q. I'm going to put up this demonstrative exhibit. I'm going to mark it Exhibit 87 and your folder that we gave your Honor, it is marked as Exhibit 87 and I'm going to move its admission your Honor.

THE COURT: Any objection, Counsel? Any questions pertaining to the exhibit?

MR. KORPUS: No.

THE COURT: It's admitted with objection.

(Plaintiff's Exhibit 87 admitted in evidence.)

MR. GOLDBERG: Thank you. If Dr. McClave can step off the stand?

THE COURT: Yes.

[Page 93]

BY MR. GOLDBERG:

Q. I have an expanded pointer for you, Dr. McClave.

A. Thank you.

Q. Can you tell the Court what Exhibit 87 is and how it relates to Dr. Chipty's --

THE COURT: Counsel, I don't have a copy of 87 in my folder.

MR. GOLDBERG: I'll get, your Honor, not a problem.

THE COURT: Okay, that's fine. Okay, go ahead, Doctor.

THE WITNESS: All right, your Honor. These are two franchises in Delaware County, your Honor, Haverford and Upper Darby.

Q. That's in the class?

A. In the class and in 2008. And what I'm showing here in the darker blue, taller bars, is what those -- what the customers were paying as list price

for the expanded basic service. So, they had identical $52.25 list prices.

Q. Can I stop you for a second, Dr. McClave?

A. Sure.

Q. This $52.25 list price, was that the price that went into your dependent variable on Exhibit 57?

A. Actually, since it's not in the benchmark, it wouldn't have been in the model, but it would have been the price to which I compared the but-for price.

[Page 94]

Q. Right, that's right, okay.

A. And since you've asked that, I'll explain the red line. The red line, your Honor is that $47.53, that's what this equation resulted in when all the variables were plugged in for these two franchises, we got $47.53 as a but-for price.

I've also shown on -- and so, the amount above that is what I called overcharge and that's what would get multiplied times revenue or that percentage, actually, would be multiplied times revenue.

If you look now at the lower blue -- light blue bars, that's the regulated and it turns out both of these are regulated franchises. So, $11.75 is the regulated price or at least, what Comcast charges. It may be actually less than the regulated price for Haverford and $17.85 is the regulated or basic price in Upper Darby.

And the point I'm making with this is the B-1 price doesn't matter, because what Comcast does is add whatever it needs to add to get to its list price. So, it would have had to add a different amount to

the $17.85, whatever the difference between that and $52.25 is, then it did when it had to add $11.75 to the $52.25.

Now, to the point of Dr. Chipty having modeled the so-called B-1 model that I've been asked about extensively, is her using this model, not for this price --

Q. By this, you're referring to Exhibit 57?

[Page 95]

A. Yes, my model. Not for this price, but to try to estimate that price. It doesn't make any sense. You can see there's a $6 difference between these two. We need something more than my model, which says for both of these franchises, $47.53 is the right number, is the but-for number. We would expect it to be the same, because the list price is the same. But I certainly wouldn't expect to get the same number for a but-for price for these two. And that's why I keep saying, when they keep saying I'm using your model for B-1, it doesn't make any sense. If Mr. Goldberg had come to me and said, you know what, this case is about the B-1 price, this wouldn't be the model. I would have started from a totally different point. And so, this is, your Honor, not atypical. There is testimony from Comcast that says when we determined the expanded basic price, the B-1 price essentially doesn't matter. We get to a number that is our list price, that is the price we're going to get to and we add whatever we need to the basic price to do that and this shows that.

Q. Thank you, Dr. McClave. You may resume the stand. I want to ask you one final question, I hope, on this. There has been in your cross-examination, in fact, Judge Padova raised it a couple

of times. A package in the Philadelphia area called Triple Play.

A. Yes.

Q. And you stated that you did not include the Triple Play **[Page 96]** numbers in your model?

A. That's correct.

Q. If I had asked you, beside the similar questions I asked you before, but I asked you to estimate damages on basic prices, you would not have used this specification, right?

A. That's correct.

Q. If I had asked you estimate Triple Play prices, would you have used this specification?

A. It would be totally different. You'd start from a totally different point.

THE COURT: Just give me a plain illustration of how it would be different and why it would be different.

THE WITNESS: The B-1 model?

THE COURT: Yes, we'll take the B-1 model.

THE WITNESS: Okay. Well --

MR. GOLDBERG: Would it be helpful for you to write it out? I'm a firm believer, your Honor and while narrative is good, sometimes with numbers, a picture helps.

THE COURT: It's up to the doctor, however he feels it's best to explain.

THE WITNESS: I think I can do this.

MR. GOLDBERG: Okay, great.

THE WITNESS: It will save time. Your Honor, first of all, we started with the idea that we're not dealing with a price set totally by the firm, by Comcast. If we set model **[Page 97]** B-1 prices, the first thing I would learn about them is these are set at the franchise levels by regulators. That's by the franchisee's authorities. And so, I would have to try to figure out what -- can I build something into the model that takes into account the regulatory process that they're going through.

And I will be honest with you, sitting here right now, it's not obvious to me what those would be, but it wouldn't necessarily be median income differences or channel capacity. Well, channel capacity is a good example. Channel capacity applies to these upper level services. The B-1 means, you know, the basics, NBC, ABC, et cetera. So, I would be looking at a totally different set of demographics, if any and I would somehow have to get behind the regulatory process. I don't need to do that when I know that whatever the regulated price is, Comcast adds whatever it needs to, to get to its expanded basic price. And that's why this model would not work for the B-1 price.

Q. I want to turn to another subject covered on cross-examination and make sure the record is clear with this criteria as discounts.

A. Okay.

Q. And you and Mr. Korpus had a relatively long discussion about discounts and what the discounts meant for purposes of both the damage calculation and for purposes of common **[Page 98]** impact inputs.

A. Right.

Q. And so, I'm going to first talk about the damage calculation.

A. Okay.

Q. Does your formula for estimating damages, in this case, coming up with the $876 million.

A. Right.

Q. Does your formula account for the discounts that are given to the class members?

A. Yes.

Q. Explain to the Judge how your formula and I'm being careful, I'm not talking about the multiple regression model, I'm talking about the formula, because it tests their formulaic way of estimating damages class wide.

A. Right.

Q. So, let me step back a second. From your expert opinion, is your formula an appropriate way to reliably estimate damages class wide?

A. Yes.

Q. All right, now, explain to the Judge how your formula takes into account the discounts that are given some of which, Mr. Korpus discussed with you on your cross-examination?

A. The short answer is it does it in the revenue. I think **[Page 99]** here, it would be helpful if I could give you an illustration.

Q. Great. If you hadn't offered, I was going to ask you. I'm going to give you a -- let's use a blue.

MR. SHUSTER: Your Honor, may we go up there?

THE COURT: Absolutely, sure.

MR. SHUSTER: Thank you.

BY MR. GOLDBERG:

Q. Is it all right if I approach the witness, your Honor? Thank you.

THE COURT: What did you mark it 57-A or a new number?

MR. GOLDBERG: Oh, I'm going to give it a new number.

THE COURT: Okay.

MR. GOLDBERG: I'll get -- it's clear he's going to do it. I'm mark this as Plaintiff's 60, your Honor.

Q. Go ahead, Dr. McClave.

A. Okay, I'm going to start out, your Honor, with 100 customers in my class. 90 pay list of $50 for expanded basic. Ten pay ten percent off for $45. Okay. The model on the previous page is used and as I've tried to make clear, it's based on comparing the list price that these 90 people pay after adjustments to list prices that the people are paying in the benchmark. Okay. And I'm going to assume that **[Page 100]** the damages or the overcharge, I'll call it, from the model, tells us that prices -- the but-for prices would be -- I'm going to change this. I'm going to give them 20 percent off and make that $40. I'm trying to make the math easy and I've thought this all the way through. I don't want to assume that the overcharge from the model is ten percent.

Q. Let me stop you for a second, Dr. McClave. Typically, does a model use for estimating overcharges and hence, damages, does the model show you the overcharge as a percentage?

A. Yes, your Honor, again, not to be too esoteric here, but when you put price on this side, using this transformation, you might remember yesterday I explained that all of these are basically percentage differences. That's what that logarithmic does. So, that's why, when we finally get a damage estimate, it comes out in a percentage difference. And of course, we're going to convert it to dollars, but this is the way it starts.

So, what this would say, your Honor, is that for the people that were paying the $50 price, the but-for would be $45. For those ten, at 20 percent discount, this would say the but-for is $36. All right. And then here's where the discounts get taken into account. In the final calculation, the damages would be 90, at list, times the $5 difference, right. Plus the ten at the $40, not times five, but times $4 **[Page 101]** and so, it's not going to be ten percent of 5,000, which is what 100 times 50 is, it's going to be ten percent of 90 at $50 and the ten at $40. So, this is going to be -- very dangerous to try to do this on the stand -- but $490, would be what that computation is.

So, when I said in answers to questions on cross, what I was trying to say is discounts are taken into account at the multiplication stage. At the stage at which we do this. We don't, we don't pretend that everybody is paying list. We take explicitly into account what people are paying, including the Triple Play. However many there are paying $33, we'd be taking ten percent of $33 and multiplying times that number.

Q. You anticipated my next question. If Triple Play were in the class, would your single formulaic

estimate of damages, be appropriate to estimating the damage for the Triple Play customers?

A. In my opinion, it would.

Q. And it can does that?

A. I'm sorry.

Q. And it can do that?

A. It is doing that.

Q. It's doing it, it can do it and it would be appropriate?

A. In my opinion, it would.

Q. Thank you. And now I want to talk about the affect of **[Page 102]** discounts on the common impact. You've expressed an opinion in your direct testimony that on the basis of your analysis and the results of your multiple regression model, finding that there were overcharges in all years and all geographic areas, it was your determination that there was common impact?

A. That's correct.

Q. In order to be able to express an opinion on -- you're not an expert, so to speak, on the legal definition of common impact, is that correct?

A. That's true.

Q. You and I, as an example, have had discussions about what common impact means and on your previous work, you have experienced this?

A. Yes.

Q. Okay, I'm going to ask you some questions as to lay a foundation here. In order to have common

impact, is it correct that every class member must have been impacted in some way?

MR. KORPUS: Your Honor, that's really not a statistician role to answer that question.

THE COURT: What I'm going to do is I'm going to give counsel some latitude, there's no jury here. And I'm going to give you some latitude on re-cross in that regard and we'll see where it comes out.

[Page 103]

MR. KORPUS: Yes, your Honor. I'll try not to interrupt the flow, but just note my objection for the record.

THE COURT: It is noted, thank you.

BY MR. GOLDBERG:

Q. Go ahead, Doctor.

A. It would be my understanding that that's all or nearly all.

Q. And is it correct that as long as a class member is impacted on, at least, one transaction, not all of the transactions have to be affected?

A. That's my understanding.

Q. And is it correct, also and I'm asking you this to lay a foundation as to the soundness of your opinion on common impact, is it also correct that the impact does not have to be the same, uniform across all transactions and all class members. The impact can vary?

A. That's certainly my understanding.

Q. And that has been your experience, hasn't it?

A. Absolutely.

Q. And in fact, your model, in this case, shows that?

A. Yes, just as the illustration we just had.

Q. Now, I want you to go back to the board, because you did explain this in a narrative to Judge Padova. But would you go on that sheet and show Judge Padova how, where there is a **[Page 104]** discount, there is, in fact, an impact? It may be right on this sheet or you may have to use a different sheet. But would you show why, even if, as an example, I'm making reference to the colloquy between you and Mr. Korpus, where he said you came up with the 13 percent overcharge, but there's a 30 percent discount, how could there be impact, do you remember that?

A. I do.

Q. And I want you to illustrate, not just tell the Judge, I want you to illustrate to the Judge why there is an impact for somebody getting a discount of more than 13 percent, why they are impacted and shown to be impacted by your model?

MR. KORPUS: Your Honor, that's about as leading as a question can get, but that's fine.

MR. GOLDBERG: No, actually, that was I just told him what I wanted him to do.

THE COURT: All right.

MR. KORPUS: (Indiscernible)

MR. GOLDBERG: Okay.

THE COURT: No, no, the definition is, when you tell him what you want him to say, not when you tell him what you want him to do.

MR. KORPUS: That's correct, your Honor. The latter is what my wife tells me.

THE COURT: Exactly. Go ahead.

[Page 105]

THE WITNESS: I think that perhaps the fallacy that can follow from if there's a ten percent overcharge and a 20 percent discount, how can there be impact, is by saying that this but-for price that's ten percent off the list must be applied to everybody. So, here's the customer is getting $40, how can they be impacted if the but-for price is $45? Well, wait a minute, the company has decided, for whatever reason, these people should be paying 20 percent less than list.

So, if the list had been -- I'm sorry. If the discount price equals $45, I'm sorry, $40 -- I want to change my example. The discount price is $40, then the but-for price for them is not $45, it's we've already established that the list is too high by ten percent. So, the fact is, the discount price is $40 and the but-for price is not -- I think I've already written this, but I'm writing it again -- is ten percent off $40, which is $36.

Another way of looking at this, your Honor, is we are saying the list price should have been $45, right? I mean, that's what this example says. So, I'm going to mess up your sticker on it.

BY MR. GOLDBERG:

Q. No, that's okay. Before you turn that page, will you put --

A. Actually, let me, I can do it on here.

[Page 106]

Q. Okay, if you can do it on there.

A. I can do it on here. The but-for list price equals $45. Now, in a world where $45 is the list price and Comcast says you're a special customer, for whatever reason for this month, I'm giving you 20 percent off of that. Where does that get us? Well, 20 percent off of $45 --

MR. GOLDBERG: They're destroying your courtroom, your Honor.

THE COURT: Pull it out.

THE DEPUTY CLERK: The bottom is still --

THE COURT: Oh, connected.

THE DEPUTY CLERK: What we could do is sit until 12:30.

THE COURT: And then we'll deal with it at 12:30. That's fine. Jen, you just call now. Tell them to send somebody up and you can continue.

THE WITNESS: All right, your Honor. So, 20 percent of this list equals $36, because 20 percent of $45 is $9. So, I get to the same place, namely, that $36 is the correct but-for price for the 20 percent off folks. $45 is the correct but-for price for the list price folks. They're both considered in the equation. They are both impacted, because discounts are off of list price. And if you change the list price, you're going to change the discount price.

BY MR. GOLDBERG:

[Page 107]

Q. Before you go off, would you put your initials at the bottom of what's marked as Plaintiff's 60?

A. Yes.

MR. GOLDBERG: And your Honor, we'd move the admission of Plaintiff's 60.

THE COURT: It's admitted.

(Plaintiff's Exhibit 60 admitted in evidence.)

(Pause.)

Q. At the beginning of your cross-examination, there was along discussion between you and Mr. Korpus about the differences between the non-allegation characteristics in the benchmark area and the Philadelphia area. Do you still remember that long conversation?

A. I sure do. I do.

Q. In order to appropriately estimate damages, using the approach, the methodology that you used in this case, Dr. McClave, does the benchmark area and the, in this case, the Philadelphia area or the area of observation, need to be identical in the non-collusion characteristics?

A. No, your Honor, the benchmark area would, I think I said yesterday, I think. I don't want to be too repetitious. Would, by definition, be different and look different than the area in Philadelphia in some very important ways. Namely, the ways that separate plaintiff's allegations from Philadelphia.

[Page 108]

Q. But that's what I mean by non-collusion.

A. Right.

Q. Mr. Korpus pointed out that there are characteristics of your benchmark area that are different from the Philadelphia area. They may not, in fact, be tainted by the collusion.

A. I understand, yes.

Q. Now, in order to have a reliable and appropriate estimate of damages, using the methodology that you use, does the benchmark areas and the areas of observation, need to be identical as to those characteristics?

A. No, that's what multiple regression analysis is.

Q. If, in fact, the benchmark areas and the areas of observation were identical and the only thing that was different was the collusion and the prices, if they were identical, would you need multiple regression?

A. No. You had two identical areas, one that had collusion and one that didn't, you could just compare the prices.

Q. That's all you --

A. You wouldn't need multiple regression that makes adjustments for this.

Q. What are these adjustments that are being accounted for on your factors on the right-hands side of the equal sign? And also, the stuff that is accounted for in the way you define your benchmark area? What are those things doing?

A. They are adjusting for differences between the benchmark **[Page 109]** and Philadelphia.

Q. Is that the purpose of multiple regression?

A. Absolutely.

Q. Thank you.

MR. GOLDBERG: I'm done with my cross, your Honor.

THE COURT: Very good, Counsel.

(Pause.)

MR. KORPUS: I'll do it in the same order Mr. Goldberg did it.

RECROSS-EXAMINATION

BY MR. KORPUS:

Q. On the B-1 issue and your assertion that Dr. Chipty's analysis on B-1, is very different from what you did and you would have done something different. I just want to clarify one thing, as a matter of fact, I'm sorry, your Honor. The price that you'd put in here, includes B-1, right? Yes or no?

A. B-1 is part of the expanded basic price.

Q. Yes, so this is --

THE COURT: The answer is yes.

MR. KORPUS: The answer is yes.

THE WITNESS: Yes.

Q. Okay, so, what Dr. Chipty did, she didn't put in a different price, she took out the other elements of that price, right?

[Page 110]

A. I call that a different price.

Q. Okay.

A. Different price, different service.

Q. Okay, let me understand what we've --

A. Different factors, okay.

Q. Now, let's look at this second chart that you drew this morning. And the question of when are

discounts taken into account and when not. This here, right here?

A. Yes.

Q. When you say that they overcharge from the model shows ten percent overcharge, which is what you are relying on for impact, that figure in your regression, does not include the affect of discounts, right?

A. It is derived from most prices, that's correct.

Q. Right. Which do not include the discounts.

A. That's correct.

THE COURT: Which means the syllogism that he's working on is that if there's a ten percent overcharge to list prices, then there's a ten percent overcharge to discount price?

THE WITNESS: That is correct.

MR. KORPUS: That is what can be done --

THE COURT: That's his object.

MR. KORPUS: -- that is assuming.

THE COURT: Right.

[Page 111]

MR. KORPUS: Has demonstrated he's assuming that.

THE COURT: Well, did you demonstrate that or are you assuming that?

THE WITNESS: Well, demonstrated in the sense, your Honor, of having looked at the discount prices and how long they last and documents that talk about the ten percent off list, the 20 percent off list. Documents that talk about, your Honor --

THE COURT: The assumption is that

THE WITNESS: -- getting discounts back to us.

THE COURT: the assumption is that if a list price was inflated by ten percent or the overcharge was ten percent, then so was the discount.

THE WITNESS: Yes.

MR. KORPUS: That is the assumption.

THE COURT: You call that an assumption and the question is whether or not that's a gratuitous assumption or demonstrated assumption?

THE WITNESS: That's right.

THE COURT: Bill Burke says it's an inference.

MR. GOLDBERG: If I could say two things, if I can respond, your Honor.

THE COURT: Sure, go ahead.

MR. GOLDBERG: If I could just say two things more than that. I say, one, as Dr. McClave says, it's actually **[Page 112]** demonstrated in the record, as Dr. McClave has reverted to and two, the 3rd Circuit has recognized that.

MR. KORPUS: And your Honor, what I'm saying is that where the 3rd Circuit says is every person must be impacted and you cannot show that for the people who received the discount.

THE COURT: I understand, okay.

BY MR. KORPUS:

Q. Now, Mr. Goldberg asked you, do the benchmark counties need to be identical to the Philadelphia counties and you say no, that's what multi-

ple regression analysis does. I think I wrote that down word for word.

A. Yes, okay.

Q. But then, you have to include the right variables to account for the differences, right, between Philadelphia and the benchmark counties?

A. The specification needs to account for all legitimate differences between them.

Q. And you would agree with me that the bigger differences there are, the more careful you have to be in including the variables to control for them?

A. I would say you have to be careful in all cases. It's my experience the benchmark is always very different than --

Q. Right.

A -- than the target.

[Page 113]

Q. And in this case, as we've established, there was a big difference in density and you did not include a variable for density, right?

A. I did not.

Q. Thank you.

THE COURT: Anything further?

MR. GOLDBERG: No, your Honor, believe it or not.

THE COURT: Okay, my understanding is that we have a witness that we're going to take at 1:30, is that correct?

MR. SHUSTER: Yes, that's --

THE COURT: The question is whether or not I should start another witness. I don't want to start another witness now. I do want -- I'm not excusing the doctor yet, I need about five minutes in my own chambers to see whether or not I have any direct or cross-examination of this expert.

COUNSEL: I don't see that as any problem, because we haven't excused the doctor.

MR. SHUSTER: Your Honor, I just again want to thank the Court for taking Mr. Burke out of order, and also very much my friends on the other side.

THE COURT: Okay. Give me ten minutes and I'll get back to you.

(Court in recess; 12:18 to 12:29 o'clock p.m.)

THE COURT: I do have some questions. And anyone who wants to run out of the courtroom after having listened **[Page 114]** to my questions are free to do so to look for another judge.

MR. SHUSTER: No, but we will make no objections to form, your Honor.

THE COURT: Okay.

(Laughter.)

THE COURT: I don't want to talk about the part that discount pricing plays in computing damages. I believe that most of the focus with respect to discount prices has been at that stage in the exercise.

Rather, I want to talk about the lack of use of bench-- of discount prices in determining the benchmark price. My understanding is that discount prices were not addressed and were not a part of your determination of what the benchmark price is.

THE WITNESS: That's true.

THE COURT: What concerns me about the process that you took with respect to discounts, the use or the non-use of discounts, is not in the calculation of damages as you've described them to me but rather in whether or not the benchmark price validly, that a benchmark -- a benchmark price that does not include discounts validly represents or validly or deprives your process from being a valid process with respect to the mission that you had in this case. Talk to me about that.

THE WITNESS: Well, your Honor --

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THE COURT: Your benchmark price is a distorted benchmark price, isn't it? Hasn't taken into consideration discounts.

THE WITNESS: The benchmark price does not take into account discounts, that's absolutely true. I will --

THE COURT: What's the benchmark price designed to reflect?

THE WITNESS: The difference in the list price, the price that in the early part of the class period more than 90 percent paid, in the latter part of the period it gets less.

THE COURT: And you had the whole -- you had the whole country to determine what you were going to use, what you were going to focus on with respect to pricing?

THE WITNESS: I did.

THE COURT: And you picked 13 or 16, what --

THE WITNESS: I picked roughly half the places that in terms of DBS penetration were on behalf of (inaudible)

THE COURT: Okay.

THE WITNESS: That's what I was doing.

THE COURT: Okay.

THE WITNESS: Your Honor, in order to use these data to try to incorporate discounts I think would have run into the same problem that everybody else that's analyzed this industry had and that is it doesn't give you a valid comparison.

[Page 116]

THE COURT: Well, that might be so but without it is there a valid comparison or are we simply in an area where we can't proceed reliably?

THE WITNESS: Of course, that's up to you but like, you know, there's an implicit or you can call it a syllogistic assumption here. And that is the record and my reading of the record and from my looking into these data the discounts are relatively short duration and are off of the list price. If I'm right about that then it follows that a lower list price implies a lower discount rate price.

Obviously, on the other side of that if I'm wrong about that then the not using discount prices is a problem. But I want to make it very clear that it's not just me that says it's very difficult to do. And you'll hear Dr. Chipty saying well, I did it. Well, the problem is that what do you do with those zeroes that are in there that are just accounting entries. What do you do with triple play? What's the right way to treat those things?

But, you know, no one, no one has come up with the answer to that. Everyone has just said, you know, in my reading of the FCC, the GAO, so on, we're going to use list prices because that is what tells us really what's going on in the marketplace. Temporary discounts don't contribute to that understanding.

THE COURT: Does either the proponent of the witness **[Page 117]** have any additional questions based on what I asked him or --

MR. GOLDBERG: I have a couple, your Honor, if I may. I'll go first.

REDIRECT EXAMINATION

BY MR. GOLDBERG:

Q. Just so the record's clear, I think you stated it casually a couple times, just so the record is clear are you the only person who in looking at, making comparisons of prices or looking at estimating prices in this industry are you the only one who has used discount prices -- I mean list prices?

A. No. Essentially everyone has.

Q. And yet --

A. Essentially everyone else has as well, but that's with the exception of --

Q. You looked at a variety of reports where there were estimates of prices in the notebook in the cross-examination and in your investigation when the FCC has made estimates of prices or done multiple regression models to explain prices, are they using list prices?

A. They are using list prices.

Q. When the GAO looks at prices to estimate prices or to explain prices do they look at list prices?

A. They do.

Q. The fact book data which you told this Court had errors, **[Page 118]** those were errors of values, right? When the fact book people are collecting through their survey the information on prices that is then published to everybody else and Mr. Korpus said is used by the people in the industry, are those list prices or are they average prices, are they discount prices, what are they?

A. They're list prices.

Q. Now I want to ask your opinion because the Judge has raised an issue. What is your opinion as to what is the best representation of price to do the work that you were doing here, is it list price, is it average price, is it discount price, what is the best representation of price to do the work that you are doing here?

A. It's list prices.

Q. Thank you.

THE COURT: Why?

THE WITNESS: Because it is the price that can be most reliably determined, it is the price that most people pay and it's the price that's used, I believe, to determine discount.

RECROSS-EXAMINATION

BY MR. KORPUS:

Q. When you say that other people in the industry, when they look at it, they look at list prices, those are not people that are trying to work out im-

pact for the purposes of a case **[Page 119]** in a court of law, right?

A. True.

Q. Furthermore, people are trying to show common impact, right?

A. Right. With the possible exception of Dr. Chipty who used fact book list prices.

Q. Not for that, not for the damages model, she used the average price for that.

A. All right, you and I disagree on that.

Q. Okay. But the people that you are talking about, you're not talking about Dr. Chipty, you were talking about the GAO and the FCC and those articles?

A. Those people were, as I understand, not trying to estimate impact.

Q. Okay.

MR. KORPUS: I have nothing further. Thank you.

MR. SHUSTER: Your Honor, we -- we are going to seek the opportunity from the Court to make an argument that the plaintiffs have not made a prima facie showing on their motion in this hearing. We can do that after one witness or we can wait until Dr. Williams has testified but we will seek the opportunity to make that argument.

THE COURT: Okay. We're going to break for lunch, we're going to reconvene at 1:30 promptly and proceed with the testimony of Mr. Roberts.

* * *

[Page 168]

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Back to the plaintiff.

MR. GOLDBERG: We call Dr. --

THE COURT: Williams?

MR. GOLDBERG: Excuse me, your Honor. We call Dr. Williams.

(Pause.)

THE DEPUTY CLERK: Please state your name for the record and spell your last name.

THE WITNESS: Michael A. Williams, W-i-l-l-i-a-m-s.

MICHAEL A. WILLIAMS, Plaintiffs' Witness, Sworn.

THE DEPUTY CLERK: Thank you. You may be seated.

(Pause.)

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q. Would you state your full name for the record, please?

A. Sure. Michael A. Williams.

Q. Where are you employed, Dr. Williams?

A. Competition Economics.

Q. What is Competition Economics?

A. It is an economic consulting firm specializing in antitrust and intellectual property matters.

Q. How long have you been doing economic consulting work?

A. 21 years.

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Q. Will you describe for the Judge your educational background?

A. Sure. I have a Bachelor's degree in economics from the University of California at Santa Barbara, and a Master's and PhD degrees in economics from the University of Chicago.

Q. What did you do after you received your PhD degree?

A. I went to work at the U.S. Department of Justice in the Antitrust Division.

Q. And then after -- how long did you work with the Antitrust Division of the United States Department of Justice?

A. For about five and a half years.

Q. And after you left the Department of Justice what did you do?

A. I went into -- I went to work for an economic consulting firm doing primarily antitrust work.

Q. Okay. So, the sequence of events then was, you got your PhD degree, you worked for five years or so for the Department of Justice, and since then you have been doing economic consulting work?

A. Yes, sir

Q. Great, thank you.

When you were at the Department of Justice in the Antitrust Division, what kind of work did you do?

A. Primarily mergers, price-fixing investigations, [**Page 170**] regulatory matters, those were the primary areas that I worked on.

Q. What kind of investigations and techniques did you apply?

A. Well, it was at the Department of Justice that I really learned how to do antitrust economics; how to learn the techniques of market definition, for example, learn the economics and econometrics of analyzing whether or not a firm or firms can substantially exercise market power in well-defined markets.

Q. You've been engaged by the plaintiffs in this case to do economic consulting and offer opinions in this case, is that correct?

A. Yes, sir.

Q. Is the type of work you did at the United States Department of Justice Antitrust Division in any way similar to the work that you've done here?

A. Yes, very similar.

Q. In your economic consulting work, have you offered economic opinions in courts or in other legal proceedings?

A. Yes, sir, I have done that probably 20 to 25 times.

Q. Have you worked for both plaintiffs and defendants --

A. Yes, sir.

Q. -- in your economic consulting work?

A. Yes, sir.

Q. In your economic consulting work, have you ever been **[Page 171]** engaged to be an economic consultant for Federal agencies?

A. Yes. Since I left the Justice Department in 1988, I have been retained on approximately ten occasions to serve as an economic expert for either the U.S. Department of Justice or for the United States Federal Trade Commission.

Q. And what kind of work did you do in those cases?

A. Those were -- I believe those were -- most of them were mergers, one monopolization case that I can think of.

Q. The type of work you did for the United States Department of Justice or the FTC, as a private consultant for them, was it similar or different from the type of work that you did in this case?

A. Well, I think the general techniques that one applies have been quite similar.

Q. In your work either at the Department of Justice or otherwise when you've been in private consulting have you published articles in economics journals?

A. Yes, I've published, I guess, about 15 to 20 articles in peer-reviewed economics journals, primarily on the subject of industrial organization and antitrust issues.

Q. Have you published any economic books or treatises, have you -- I'm going to ask it differently -- not published, have you been an author or co-author of any economic books or treatises?

A. Yes, sir. I published a book with Professor Paul McEvoy **[Page 172]** from Yale University that was an economic analysis of the long-distance telecommunications industry.

Q. Do some people at least consider your book with Professor McEvoy to be one of the leading treatises in that area?

A. I believe that would be fair.

Q. All right. I want to turn now --

MR. GOLDBERG: -- we offer, by the way, Dr. Williams as an expert.

THE COURT: Any objections?

We receive Dr. Williams as an expert in economics and econometrics with respect to antitrust.

MR. GOLDBERG: Thank you, your Honor.

BY MR. GOLDBERG:

Q. Dr. Williams, will you describe for Judge Padova what your assignment was in this case, what did we ask you to do, sir?

A. I was asked initially to investigate certain of Comcast's conduct in the Philadelphia area, in particular the economic effects, if any, relating to the nine swaps and acquisitions that extend over about a decade. I was also asked to examine the economic effects, if any, relating to the decision of Comcast to withhold SportsNet Philadelphia from the satellite companies. I was also asked, where appropriate, that is where it was relevant to my analysis, to define any relevant antitrust markets. And, finally, I was asked to consider, if **[Page 173]** there were any anti-competitive actions or outcomes flowing from Comcast's conduct, to make a determination as to

whether or not that was a generalized effect felt by Comcast customers throughout the Philadelphia DMA, in other words, whether it was a common impact.

Q. So, there were four basic assignments: To examine the economic effect of particular conduct, is that correct?

A. Yes, sir.

Q. To -- where necessary to your analysis, to define relevant antitrust markets, is that correct?

A. Yes, sir.

(Pause.)

Q Oh, and to determine whether there was common impact?

A. Yes, sir.

Q. As to the first assignment, that is to determine what effects, if any, economic effects, if any, of Comcast' s behavior, one of that conduct was the swaps and acquisitions?

A. Yes, sir.

Q. Did you prepare any demonstrative charts to help you explain to the Judge the extent of clustering and acquisitions in the relevant area?

A. Yes, sir.

(Pause.)

MR. GOLDBERG: This, your Honor -- sir, did you mark the exhibits that we gave to the Judge? I think it's 90, **[Page 174]** your Honor.

THE COURT: This is -- the exhibits you gave me were 90, Plaintiffs' Exhibit 90.

MR. GOLDBERG: Right. This is 90.

Is it all right if Dr. Williams comes off the stand, your Honor?

THE COURT: Yes, sure.

MR. GOLDBERG: Please come off the stand, Dr. Williams.

(Pause.)

MR. GOLDBERG: Can I just move all of the exhibits, 90, 91, 92 and 93, your Honor?

THE COURT: Any objection?

They're admitted without objection, 90, 91, 92 and 93.

(Plaintiffs' Exhibit Numbers 90 through 93 received into evidence.)

BY MR. GOLDBERG:

Q. Will you explain, Dr. Williams, to the Court what is shown here on Chart 90?

A. Sure. This chart shows in purple the Comcast Cable properties circa 1998.

Q. In what areas?

A. Well, they're in --

Q. No, generally.

[Page 175]

A. Well, near the Philadelphia area, northeast of Philadelphia, and then some down in Delaware.

Q. And that was before the relevant time or at the beginning of the relevant time of your investigation?

A. Yes, sir.

Q. And where Comcast had cable franchises in the Philadelphia DMA, how are they designated on the chart?

A. They are the purple blocks shown on the map.

Q. So, let's ...

(Pause.)

Q. I'm showing you what we've marked and has been admitted into evidence as Plaintiffs' Exhibit 91. Explain to the Judge what Exhibit 91 is.

A. Sure. The purple area shows the Comcast presence in the Philadelphia area in 2007. And, just to be clear, this map was done to show what was -- led up to the last -- I mentioned that there were nine swaps and acquisitions, this map leads up to the ninth, and so that's the small green area up here was the last acquisition of the Patriot Media.

Q. And so you have a bunch of area, a bunch of franchises designated in purple, and that's all Comcast?

A. Yes, sir.

Q. So that would be these fewer franchises in 1998 shown on Exhibit 90 in purple plus the other swaps and acquisitions other than the Patriot in purple?

[Page 176]

A. Yes, sir.

MR. SHUSTER: Objection, leading. There's no need to lead the witness quite that much.

THE COURT: Okay. Well, you can proceed.

MR. GOLDBERG: Thank you, your Honor.

BY MR. GOLDBERG:

Q. And then the green again, for the record, the swap that is reflected in green -- I'm sorry, the acquisition that is reflected in green, the Patriot acquisition on Exhibit 91, did it go through?

A. That's my understanding, yes, sir.

Q. So, Chart 2007 would then visually describe the Comcast presence in the Philadelphia DMA?

A. As of the present time, it would be the combination of the purple plus the small green area.

Q. Thank you, Dr. Williams.

You didn't make up those maps yourself, right?

A. Well, we -- actually, I think we did, but they were based on information, I think it's just -- it's not controversial, I don't believe.

Q. Actually, you or people working at your direction at Competition Economics or its predecessor did up these maps?

A. Yes, sir.

Q. Thank you.

What do these charts, as an economist making the **[Page 177]** type of inquiry that you made in this case, what do these charts show you visually, what kind of information does it give you that's pertinent to your investigation?

A. Well, I would say, to an economist, they're very interesting. You want to know what economic forces would drive a company to engage in the clustering that they've engaged in and then it -- I think it begins to give you some feel for, as I mentioned, if there were certain parts to my analysis that were go-

ing to depend on a market definition, I think it -- when I first looked at the maps, it gave me a feel for where -- that intuitively this was in some sense -- the clustering was an important phenomenon with which to at least consider plaintiffs' claims. And so I think that gave me some direction to the way I at least began my kind of initial thoughts about market definition.

Q. And what -- what -- how did it influence your initial thoughts on market definition?

A. Well, just that it was clear that the clustering was, you know, systematic, pervasive, you know, driven over a course, as I said, of about ten years, and that it would appear again, this is sort of initial thoughts -- that there are important economic forces underway here. And then the question would be, what would explain the incentive to engage in such conduct and are there aspects has that clustering caused any -- resulted in any changes in competition.

[Page 178]

Q. Right. I want to return now to the assignment that you described. Can you summarize for the Court generally what kind of work you did in the assignments that you described?

A. Sure. In the field of industrial organization, which is my specialty, and then antitrust is sort of a sub-specialty within the field of industrial organization, there really are two ways that any IO economist can study the presence or absence, you know, of competition in a marketplace, how competitive is the marketplace. The first is referred to as a structural study.

A structural study is one in which an economist doesn't attempt to directly measure how competitive

a market is, but instead examines features like, how many firms are in the marketplace? What are their market shares? Is there one large firm and some small firms? What's the overall level of market concentration? Are there barriers to entry? And then attempt to draw inferences from that sort of study, which by the way is exactly how the U.S. Department of Justice and the Federal Trade Commission horizontal merger guidelines contemplate that most mergers will be analyzed. So that's one of the two studies that I thought under -- that I did undertake in this case.

Q. Before you go on, that study, again, is called a structural analysis or a study of the structure of the market?

[Page 179]

A. Yes, that's a structural analysis and it does depend on the definition of a relevant market.

Q. So, as part of your analysis, your structural analysis, you need to define a relevant antitrust market?

A. That's correct.

Q. And the purpose of that study, again, is to do what?

A. Well, again, the goal to a structural study is to draw inferences, albeit they're indirect, because you're not directly measuring the ability of a firm or firms to exercise market power, that is to exercise directly kind of an ability to charge prices for a significant period of time in excess of cost. Instead, what you're indirectly trying to do is measure that by evaluating, how large is their market share? Are there barriers to entry that prevent a new firm from

coming in and competing against them? So that's an indirect way to get at the ability of a firm to exercise market power and that's, as I said, referred to as a structural study and does depend on defining a relevant antitrust market.

Q. I want to get some terms down. As you said, the goal of your structural study is to see if you could determine the presence or absence of market power, correct?

A. Yes, sir.

Q. And I think that that's the goal also of the other study that you did of market performance, correct?

A. Yes. The difference is that a market-performance study **[Page 180]** in some sense is a complement to a structural study. With a market-performance study, what one attempts to do is to directly measure the ability of a firm or firms to exercise market power. And an important difference with a performance study is that, if one can do it -- and you can't always do it, because you need the necessary data -- if you can do it, it does not depend on a market definition, because you're not relying on any particular definition of a relevant geographic market or a relevant product market; instead, you're directly measuring whether or not firms in fact exercise power over price.

Q. So, both of them are you're looking to see whether there's market power, one investigates to see if there's indirect or circumstantial evidence of market power and one is investigating whether there is direct evidence of market power?

A. That's correct.

Q. The term market power itself that you and other economists use, is that sometimes referred to by economists and others as monopoly power?

A. Yeah. I think it's fair to say that the phrase, for example -- there's no bright line between, for example, when an IO economist uses the phrase to say substantial market power or monopoly power. I think you could get a consensus amongst IO economist that there's not a bright line between **[Page 181]** those two. What we mean is the ability of a firm for a significant period of time to charge prices in excess of costs, in excess of prices in a competitive market, that would prevail in a competitive market.

Q. Okay. Did you do both of those -- were you able successfully to conduct both of those analyses, the market-structure analysis and the market-performance analysis, in this case?

A. I believe so.

Q. And you filed -- you submitted in this case a number of reports, is that correct?

A. Four reports, yes, sir.

Q. And are the details of your findings and conclusions set out in those reports?

A. Yes, sir.

Q. All right. So, for this afternoon, for the purposes of your testimony -- and the reports, I'll tell you, Dr. Williams, are part of the record in this case, so we don't have to go into all of the details. So, for the purposes of this afternoon, can you summarize for Judge Padova what your conclusions were on the basis of your market-structure analysis and your market-performance analysis?

A. Sure. So, with respect to the market-structure analysis, as I mentioned, the first step there is you must define a relevant antitrust market. For reasons I'll describe in more **[Page 182]** detail a little bit later, I define the relevant antitrust market to be -- the relevant product market to be MVPD services and I defined what I believe to be as the right -- relevant geographic market to think about plaintiffs' claims is the Philadelphia DMA

Having defined the relevant -- in my opinion, the correct relevant antitrust market, the next step in a structural analysis is to assign market shares to the firms in the marketplace, and the way that we do that in antitrust economics is we measure what we regard to be the best estimates of the likely future competitive significance of different firms. In this case, I don't think it's too controversial, we simply -- what I did was simply measure their share of subscribers in homes taking either cable or satellite television.

The next step is to characterize --

Q. Before you go on --

A. Yes, sir.

Q. -- what market shares did you assign to Comcast over the relevant period? First of all, let's talk about what was the relevant period.

A. Sure. Well, I guess the damage period begins in 1999 through the present, my analyses focus essentially over that time period. The -- we don't have data, you know, up to the present obviously. To get market share data, you know, **[Page 183]** you're relying on public sources to get the market share data and don't have them, you know, as of last week, let's say, but --

Q. Summarize for the Judge what market share you assigned to Comcast over the relevant period of time.

A. Sure. So, from 2000 through 2008, I believe, Comcast' s market share ranges from approximately 65 percent up to about 77 percent.

Q. In the Philadelphia DMA?

A. In the Philadelphia DMA, yes, sir.

Q. Go ahead, I had interrupted.

A. And the next step is, having assigned market shares to all the firms that are competitors in the relevant antitrust market, the next step is to characterize the overall level of market concentration. And there's a very well known and familiar statistic that's used to do that, it's referred to as the Herfindahl-Hirschman Index, the HHI, that's discussed at some length, for example, in the U.S. Department of Justice and Federal Trade Commission horizontal merger guidelines.

So, I calculated, based on the market shares, the Herfindahl-Hirschman Index, which was in excess of 5,000, which is substantially, a very highly concentrated marketplace, as you would expect when one firm has, you know, 65 to 77 percent of the market. The horizontal merger **[Page 184]** guidelines, for example, characterize any market with a Herfindahl Index in excess of 1800 to be highly concentrated. So, a Herfindahl Index in excess of 5,000 is certainly quite a concentrated marketplace.

And then the last step is to ask the question, are there substantial barriers to entry? In other words, if you have a market, you could have in principle a highly concentrated marketplace and one firm with a

very high market share, but if there are no barriers to entry, in other words, if the firm attempted to exercise market power and it was quite easy for rival firms to come in, we would probably conclude that the firm, despite its high market share and despite the high level of market concentration, doesn't actually have a lot of ability to exercise market power.

So, the last step in my analysis really was to characterize and understand, what are the barriers to entry into competing in the provision of MVPD services within the Philadelphia DMA. And my conclusion was that there are very, very substantial barriers to entry. I think actually Mr. Burke described some of them. It's a tremendously costly business to get into either as a cable company or as a satellite company. So, there are in fact substantial barriers to entry, not just the cost. The Federal Communications Commission, for example, in characterizing barriers to entry also talks about what is applicable to this **[Page 185]** case, that a firm attempting to enter the market might not be able to get access to critical must-have programming such as SportsNet Philadelphia.

Q. So, you determined, one, that Comcast's market share over the relevant period was somewhere between 65 and 75 or so percent, that there was a very high HHI above 5,000, that there were substantial barriers to entry. What conclusion, ultimate conclusion then did you draw from your market-structure analysis?

A. Well, the conclusion that I drew from those analyses was that Comcast -- given that -- those features of the marketplace, Comcast likely would be able to exercise substantial market or monopoly power and it would in fact be effective in its ability to

do so, that is it likely -- based on this indirect analysis, it likely would be able to in fact charge prices in excess of a competitive level for a substantial period of time.

Q. And, if it did then exercise that monopoly power by charging prices above the competitive level, would it have been effective and would it have been generally effective in the area?

A. I believe so. As I said, I think that, given that setup, that's quite -- you know, it's a very substantial market share, a very high level of market concentration, thinking about this in the context of a structural analysis, that it **[Page 186]** likely would be effective in its ability to exercise a substantial degree of market power.

Q. So, we're talking about summarizing your conclusions. Turn then to your next set of conclusions in this case.

A. Yes, sir. So, now turning to the performance side of the study, which, again, does not depend on a definition of a relevant antitrust market.

The first performance analysis I performed was of precisely the issue of Comcast's decision to not offer for sale SportsNet Philadelphia to the satellite companies, and I analyzed really three aspects of that: What was the effect of Comcast's clustering on its incentive and profitability of withholding SportsNet Philadelphia from the satellite companies? Number two, what was the likely -- or what was the effect on the penetration rates of the satellite companies, DBS providers? And, finally, what was the effect on Comcast's rates following a reduction in DBS penetration rates?

Q. By Comcast's rates, you mean the prices they were charging for cable services to its customers?

A. Right, in particular for their Enhanced Basic Service to their customers.

And, in a nutshell, my conclusions were that the clustering of Comcast property increases its incentive to withhold SportsNet Philadelphia from the satellite companies **[Page 187]** for a very intuitive reason, that the reduction in DBS penetration rate affects the entire DMA. So, as Comcast clusters, it captures more and more of the gains that is created by reducing the DBS penetration rate throughout the DMA

I also determined based on my review of the -- there's a substantial economics literature that has evaluated the effect of whether or not DBS penetration rates fall when satellite companies are denied what's sometimes referred to as must-have programming and I reviewed that literature. There's also a substantial literature, in particular two -- a number of econometric studies done by the FCC and other economists that have specifically looked at Philadelphia and asked the question, has Comcast's withholding of SportsNet Philadelphia reduced DBS penetration rates in the Philadelphia DMA, yes or no? And the FCC, for example, has studied that issue twice with econometric studies and determined that Comcast's penetration rate is about -- I'm sorry, the DBS penetration rate is about 40 percent below what it otherwise would be because Comcast has withheld SportsNet Philadelphia.

Q. Did you prepare a chart, Dr. Williams, to assist the Court in ... to help you explain that to the Court?

A. Yes, sir.

(Pause.)

[Page 188]

MR. GOLDBERG: I believe this is Exhibit 92.

THE COURT: 92?

BY MR. GOLDBERG:

Q. I'm showing you what we've marked as Plaintiffs' Exhibit 92 and has been admitted into evidence. Would you first explain to the Court what it is, so that we have a record as to how to read it?

A. Sure. This shows the -- over the period February, 2000 through May, 2008, the dark blue line, the lower line, is the DBS penetration rate in the Philadelphia DMA

Q. And DBS of course refers to what we call the satellite providers, DishTV --

A. And DirecTV.

Q. -- and DirecTV, what you see all the ads and the papers on--

A. Yes.

Q. -- 180 channels and so on?

A. This would be their combined share in the Philadelphia DMA. And then the light blue line above shows the nationwide DBS penetration rate for those two companies over that same period.

And just to be clear, your Honor, this is -- these are -- this is not the result of the FCC's econometric study, this is simply just the basic statistics; in other words, the DBS penetration rate in the Philadelphia

DMA and the DBS [**Page 189**] penetration rate in the country.

Q. This is not the product of a multiple-regression analysis or anything like that, this is just taking the penetration rates and plotting them and showing what -- showing them -- this is a starting point?

A. Yes, sir.

Q. Go ahead.

A. I think when you look at the graph, in the same way that looking at the two maps that we looked at earlier kind of, you know, make you say there's something interesting going on here. Can I, as an economist, explain what's causing this? You know, we have about a nine-year period here where there's clearly some systematic difference between the two penetration rates.

Q. Is there ever a time when the penetration rate of DBS providers in the Philadelphia area matches or even comes close to the national penetration?

A. No, no. You can see it's consistently running, you know, I would -- probably ten to 12, 14 percentage points below, you know, over this whole eight-or-nine-year period. And, as I said, as an economist, that makes you want to say, what would cause this? How can I explain it? And that's what the FCC and other economists have studied.

Q. Go ahead, take the stand again. Thank you, Dr. Williams.

(Pause.)

[Page 190]

Q. And, again, we're still in your summarizing your conclusions to the Judge, but before we go on, in your earlier answer you described it, you said there was a large body of literature, economic literature and econometric literature, that addressed the effect on penetration rates?

A. Yes, sir.

Q. In the course of your submission of reports, did you seek to catalog and put into one place for the convenience of the reader, in this case Judge Padova, all of that literature?

A. Yes. So that's in my last report, which I believe is dated September 11th, the supplement expert declaration. And that report, your Honor, has a series of seven tables, I believe Mr. Woodward flashed through them rather quickly in his opening, and the first three tables pertain to this DBS issue that we've just been discussing.

So, in particular, the first table asks -- or attempts to assemble the economic evidence for the -- to investigate the issue of, as it says in that left-hand column, you know, did increases in Comcast's share of subscribers -- I'm on, for example, Page 6 --

THE COURT: 6?

THE WITNESS: Yes, sir.

THE COURT: Okay, got it.

THE WITNESS: If you look in that--

THE COURT: I have it.

[Page 191]

THE WITNESS: So, if we look in the left-hand column, did increases in Comcast's share of subscribers in the Philadelphia DMA increase its incentive to deny DBS providers access to CSN Philadelphia, make that denial profitable. And then in the next two columns -- and this extends over a couple of pages -- in the next two columns I have attempted to assemble the evidence sort of pro and con. What evidence have I found in my economic research that suggests that the answer to that question is yes and what evidence have I found that suggests that the answer is no?

Just to move the ball forward, the next table -- I mentioned that there were three steps to the DBS analysis, the next table does the second step. I'm on, for example, Page 8. And it asks, does denial of access to regional sports programming cause a reduction in DBS penetration rates? And I would like to make one small updating to this table, because I realized after I had prepared it that I had missed a couple things. On the -- in the far -- in the right-hand column for Drs. Teece and Chipty, I neglected to mention that -- because I was really focused on existing literature, but I should have mentioned that in this litigation Dr. Chipty has conducted an econometric study that addresses this issue, and the flip side that I missed was Dr. Singer, as you might guess, had some comments on what Dr. Chipty had to say. And so those -- so there should be an **[Page 192]** addition in the far right-hand column, mention that Dr. Chipty has addressed this issue in this litigation, and then in that middle column that Dr. Singer also has conducted an econometric analysis of this precise issue, that is does denial of access

to regional sports programming cause a reduction in DBS penetration rates.

MR. GOLDBERG: I will say, your Honor, that in preparing for his testimony, when Dr. Williams noted this omission, he himself was offended by it and he wanted the opportunity to make sure that he got it on the record.

THE WITNESS: The -- just to finish off the first three tables, which gets us through the DBS issue, the third table, beginning on Page 12, asks that last question: Is it the case that reductions in DBS penetration rates caused higher cable rates? And, again, that middle column was my effort to assemble all of the evidence that answers that question in the affirmative and the far right-hand column was my effort to assemble the evidence that essentially answers it in the negative.

MR. SHUSTER: I just -- forgive me, I apologize, I just want to make sure I am where the witness is. Are we looking at Page 12?

THE COURT: We're on Page 12?

THE WITNESS: Sure.

MR. SHUSTER: Thank you.

[Page 193]

THE COURT: Table 3, Page 12.

MR. SHUSTER: Thanks.

THE WITNESS: So that gets us through the first three tables and, in particular, I have now finished my longer than I had hoped, but hopefully not too long, summary of my first performance analysis.

BY MR. GOLDBERG:

Q. Okay. Now, we're going to talk -- we're still not done summarizing your conclusions in this case, but before we go on I just want to get -- I want to address one point.

A. Yes, sir.

Q. One of the criticisms -- let me step back a little bit -- the defendants have economic consultants working for them also in this case, correct?

A. They certainly do.

Q. And the Judge is going to hear from them. One of the criticisms that is leveled at your investigation and conclusions here is that -- the criticism that what you did, you didn't conduct your own econometric studies, you didn't do your own empirical analyses, what you did was you looked at the literature and you reported what was found in the literature. Do you recollect the defendants' consultants doing -- making that criticism?

A. Actually, they may have. I don't actually remember them making it, but I remember in the opening Comcast's counsel **[Page 194]** made that point.

Q. How do you respond?

A. I think what I have done is what many IO economists would do. I mean, for example, when I was at the Justice Department, if somebody -- if my boss knocks on my door and says, Mike, I've got a new merger for you to investigate, the very first thing you want to know is, is the industry -- I want to know all about the industry that I'm being asked to investigate. Sometimes you get to an industry that economists haven't really looked at much and

maybe you need to go out there and do your own studies and say, no one has ever looked at this before, I really need to do some original work, find out, you know, do I think this industry is competitive or not competitive. The flip side, as you might imagine, is that you have industries and markets that are intensively studied by economists, this happens to be one of those cases. Not only has the cable industry been studied intensively by the FCC for well over a decade. As has been mentioned to your Honor, there's been a number of GAO econometric studies on the subject. And a large, large number of peer-reviewed papers published about the cable industry generally, really all aspects of this litigation, including Philadelphia-specific analyses.

So, what I have really tried to do insofar as, for example, this DBS issue, is tried to as best I can look at **[Page 195]** the large body of econometric analyses that have been done on these three issues and draw my own inferences, based on my reading of the literature, what I think the weight of evidence seems to come down on. So that's really what I have tried to do. And the same comment applies to the other studies that I did; we haven't gotten to them yet, but about the effects of clustering on over-building or on bargaining power, and so on, the same -- I really tried to follow the same methodology.

Q. The methodology that you employed here, looking to see whether there was reliable literature and relying on that literature as economic evidence, is that the type of methodology that you employed when you were at the Department of Justice?

A. Yes, it certainly is.

Q. Is it the type of methodology that you employ when you consult now as a private consultant for the FTC and the Department of Justice?

A. It absolutely is. And, again, it depends on what literature there is; if there's a lot, that's great, you know, and I think you can read through the -- you can study it and say, where is really the weight of the evidence? If there's nothing there, then you have to either go out and do your own performance studies, and lots of times you can't do that, so maybe do it as a structural study. But in this **[Page 196]** case, in my opinion, I think that it's good, frankly, for both sides that there is a large body of prior economics and econometric work that has studied the issues that have been raised in this litigation.

Q. Okay. Having reviewed and analyzed and made the type of judgmental conclusions that you have made as an economist from this literature review, what did you ultimately conclude as to this, the economic effect of this conduct?

A. Well, and the this, we're on the DBS?

Q. That's right.

A. Right. So, my conclusion was, I think the weight of the evidence, in my opinion, is quite clear, that the answer to all three of those first questions is yes, I believe, based on the large weight of the evidence. And, in particular, the -- what I would really hope to draw your attention to, your Honor, is the FCC's 2007 Program Access Order, it contains a detailed discussion of all three of these issues. And, in particular, that study answers all three of these questions in the affirmative. And to skip ahead a little bit to the third question -- and, again, I'm back to Page 12 of the report we were looking at and I'm

looking -- if I could, I'd just like to read just that one quote that's -- the first quote in that middle column right there. This, again, is from that 2007 FCC Program Access Order and they're analyzing this precise issue in Philadelphia.

[Page 197]

Q. And the issue again is?

A. Did the denial -- or did the withholding of SportsNet Philadelphia have an adverse effect on competition? Did it reduce penetration rates and did it cause ultimately Comcast rate payers to pay higher rates for their Enhanced Basic cable service. And the FCC writes, and this is a quote, "There is factual evidence that cable operators have withheld RSN programming," regional sports network programming, "from competitors, and in two instances, in San Diego and Philadelphia, there is empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market."

I read that as very powerful evidence that the FCC has concluded that the withholding of SportsNet Philadelphia has, as the FCC says, had a material adverse impact on competition. And, to an economist, that means something very precise. It's not harm to a competitor, it's not a fight between two companies where one firm invents a new product and that harms a competitor, but ultimately that's actually good for consumers, that's not how I read what they say. The way I read this, it's very clear what they're saying is it's harmed competition. In antitrust, that means something very specific, that means that consumers have been harmed. So, either prices have gone up, holding the quality of the product constant, or the prices stayed the same or the

[Page 198] quality has been diminished. To an economist, those are just two sides of the same coin.

Q. Are you just parroting the FCC's finding to the Judge or are you using this as a basis for your own opinion?

A. Well, I sure hope it's the latter. Really what I -- again, what I have tried to do is just read the entire literature as best I can and see where the weight of the evidence, to me, in my opinion, and obviously, you know, I suppose somebody could disagree, but to me the evidence is quite clear that that's where the weight of the evidence lies.

Q. On the basis of your literature review, has anybody demonstrated that the withholding of must-have programming like RSN on these DBS providers has not resulted in a diminishment of the penetration rate and a harm to competition?

A. You know, with respect -- let me break that into two pieces, because there was penetration rate and then harm to competition. The only economist that I am aware of that has determined that the withholding of, you know, critical regional sports broadcasting programming, or Comcast SportsNet in particular, SportsNet Philadelphia in particular, the only study that I am aware of that answers that question in the negative, that is that says that it has not in fact had an effect on penetration, is the one **[Page 199]** performed by Dr. Chipty. Without exception, every other economist, including the FCC studies and the GAO studies that I'm aware of, have all found the opposite, that it has had a material adverse impact on penetration rates.

Q. Thank you, Dr. Williams. Will you go on to your next -- summarize your next conclusion for the Judge?

A. Sure. Well, actually, just to -- your question had two parts there, I didn't quite get to the second part about the--

Q. Thank you, Dr. Williams.

A. -- about the -- am I aware of anyone who has found -- am I aware of any econometric studies finding that the -- that following the decrease in DBS penetration rate there was not--

Q. Harm --

A. -- an increase in cable --

Q. -- harm to competition?

A. -- not harm to competition. And the answer is, no, I have not seen such a study.

Q. And does economic theory suggest that if there is a significant and prolonged diminishment of penetration by a competitor like the DBS providers that there should be harm to competition?

A. I think so. In fact, another thing that I would draw your Honor's attention to, if you look in the FCC -- I'm **[Page 200]** sorry, in the 2007 FCC's Program Access Order, there's a very interesting quote where they're kind of teeing up the issue and they're saying, hey, here's what we're going to be studying. And after explaining that they believed their econometric result is right, that is that they have in fact determined that withholding such programming actually does reduce the penetration rate, they then go on to write that this predict -- the word they used was predictably -- that this predictably

will harm competition. And, frankly, that's my intuition as well. So, I do think that it's -- in some sense, I believe that's the common-sense outcome of such a substantial reduction in the DBS penetration rate, that it would harm competition.

Q. Thanks, Dr. Williams. Let's move on then to summarizing your next group of findings.

A. Sure. And just to anticipate, your Honor, these are summarized in Table 4 of the same report we're looking at and that begins on Page 22.

So, the question here is -- as I mentioned at the top, there have been a very large number of empirical studies of competition in the cable industry and one of the issues that economists have addressed, including economists at the FCC, the GAO and independent academic researchers, is the question that's posed there in that left-hand column at Table 4: Do a cable system's rates increase, all else equal, when **[Page 201]** it becomes part of a cluster or becomes owned by a large MSO? Multiple system operator. This has been studied at length again and again. It actually has a very interesting history, because the first researchers to study this expected to find that clustering or being owned by a large MSO would -- all other things equal, that is in the context of a regression model where you're holding other factors constant, they expected to find that the weight, to use Dr. McClave's term, that the weight in that regression coefficient would have a minus sign in front of it, that's what they thought they would find.

Q. What does that mean?

A. They thought that what they would find was that clustering generated efficiencies or economies of scale, or the ability to perhaps buy program-

ming at lower costs, and that's not what they found. In fact, the very first paper that I'm aware of that was published in a peer-reviewed economics journal was published in 1997 in the Rand Journal of Economics, which is actually the leading journal in my field, the field of industrial organization, and it was a paper by Emmons and Prager, and they express surprise that they found this result. They had actually compared two years, they compared -- in two different regression models -- 1983 to 1988. And at first, in '83, they found that there was no relationship between being owned by a large MSO and [**Page 202**] the cable system's rates. Just to be clear, what they actually measured was how many cable systems a big MSO owned. And then, in '88, they ran their regression again, or using data from 1988, they ran their regression again, and they found a positive and statistically significant coefficient on that. And they wrote in their article, this is very surprising, we don't know why this has happened.

Q. Positive meaning that --

A. Positive meaning --

Q. -- as clustering increases, prices increase --

A. Exactly.

Q. -- rather than decrease?

A. That large, clustered MSOs, all other things equal, seem to charge higher prices, not lower prices. And they expressed surprise and said -- they said, this really needs to be studied further, we don't know why this is happening.

And then, just to quickly move ahead, there's a whole series of reports on this exact issue performed by the FCC, the GAO and independent academic re-

searchers. And my reading of that literature is that it -- I think it leads to a very robust conclusion, which is that over and over again people find this effect. Sometimes it's caveated, sometimes the results are positive but maybe not statistically significant. Sometimes the researchers will say, well, it looks like the big ones charge higher prices, but maybe **[Page 203]** there's something we're not quite controlling for. In my opinion, when you read all of the studies, I think that, at least what I came away with, was a firm opinion that there is this persistent relationship between, all of the other factors being held constant, large, highly clustered MSOs, all other things equal, charging higher prices than non-clustered systems.

Q. In your review of the literature, has anybody doing an empirical analysis found that clustering resulted in statistically significant and persistent lower prices?

A. The only person that I'm aware of that has ever reached that conclusion is Dr. Chipty in this litigation.

And, just to be clear, by my count, Dr. Chipty reports 12 regressions on this subject; eight of her regressions actually have a positive coefficient, sometimes statistically significant, sometimes not, four of them have negative, and I think it's two statistically significant, two not, if I remember correctly.

Q. So, what's your ultimate conclusion then from the review of the literature that you have reported in your reports in this case and have summarized for Judge Padova?

A. Well, again, on that second performance study, what we're analyzing here in Table 4, this question, you know, do a cable system's rates in-

creases, all else equal, when it becomes owned by a large, highly clustered MSO, in my **[Page 204]** opinion, the weight of the evidence is clear that the answer to that question is yes.

Q. Okay. And then we move on to your next set of conclusions and summaries?

A. Yes. That would begin, your Honor, on Page 29 of the same document in Table 5.

THE COURT: I have it.

THE WITNESS: And so here there's kind of an ancillary question following on the one that we just studied, which is, is it true -- is there -- what is the economic evidence on the following question: All else equal, does clustering tend to reduce over-building?

Now, there is a small -- just to be clear, there is a smaller literature on this subject, it has not been studied as intensively as the question we addressed in Table 4. But the evidence that is there, in my opinion, the weight of it is answering that question in the affirmative, that there is, in my opinion, I regard it as -- as I said, the weight of the evidence being that the answer to that question is that, yes, all else equal, clustering does tend to reduce over-building.

BY MR. GOLDBERG:

Q. So, taken all together, the market-performance analysis that you did -- you said to the Judge at the beginning of your testimony that you did two types of analyses, a market-structure analysis that led you to believe that the market **[Page 205]** structure had the characteristics that would allow the exercise of monopoly power -- overall, in your

examination of market performance, what did you conclude?

A. That, in my opinion, the conduct at issue, that is the nine swaps and acquisitions, coupled with the withholding of SportsNet Philadelphia, have in fact enabled Comcast to exercise substantial market or monopoly power, in particular charging prices in excess of the competitive level for a significant period of time.

Q. All right. The third question that we asked you to answer in your engagement was what we've all talked about in this hearing, the common impact question.

On the basis of the analyses that you did, the market structure analysis, the market performance analysis, and then the other investigation you did, did you draw a conclusion as to whether the plaintiffs are able to prove the conduct that they complain of in this case, would all class members have been adversely impacted? Do you have an opinion on that?

A. Yes, I do.

Q. And what is your opinion?

A. My opinion is that the answer to that question is in the affirmative, and that flows -- to take just one example -- the DBS effect, you know, obviously the satellite companies, they're lack of Sports Net Philadelphia, according to my **[Page 206]** reading of the econometric literature, has reduced their penetration rate throughout the Philadelphia DMA, and according to the FCC and other researchers has led to the outcome that Comcast rates are higher throughout the Philadelphia DMA, and so I believe that, yes, there would be a common impact.

And all of the studies that I've analyzed, rely on in my opinion, common evidence. I'm not -- all the studies that I've looked at don't depend on any particular characteristic of any individual cable consumer within the Philadelphia DMA

Q. Mm-hmm. I want to turn now, Dr. Williams, to the disputes that have been going on between you and Dr. Singer on the one hand, the plaintiffs' experts, and the defendant's experts on the other hand.

Would it be fair to say that there are a lot of disputes between you and the defendant's experts on these issues, correct?

A. Yes, sir.

Q. And have you answered each and everyone of those in your reports?

A. I certainly have attempted to.

Q. All right. So let's then, for purposes of this afternoon, can you identify for Judge Padova what you see as the key disputes --

[Page 207]

A. Sure.

Q. -- between you and the defendant's experts?

A. Yes, sir. I'm going to -- because there are in some sense big disputes and then not so big disputes if you will -- I'm going to focus on what I regard as the six big disputes.

So the first one is, again, going back to where we began with the structural study. The first big dispute is geographic market definition.

Q. Is there any dispute, any real -- in your estimation -- any real dispute as to product -- to define an anti-trust market you have to define the relevant product and you have to define the relevant geographic area, right?

A. That's correct. Yes, sir.

Q. In simplistic layperson's terms.

A. Yes, sir.

Q. Is there any real dispute between you and the defendant's experts that this Judge is going to have to address as to product definition, in your opinion?

A. I don't believe there is.

Q. Okay. So now turn to then the disputes between you and the defendant's experts in the geographic market?

A. Sure. As I understand it, Defense experts have taken the position that the relevant anti-trust market -- the relevant geographic market I should say -- for performing **[Page 208]** that structural analysis that I described is an individual household within the Philadelphia DMA

Q. How many individual households are there within the Philadelphia DMA?

A. There's approximately 2.95 million households in the Philadelphia DMA

Q. So the position being that they're almost 3 million relevant geographic markets?

A. Yes, so there -- well, yes, 3 million relevant anti-trust markets, approximately 3 million relevant anti-trust markets.

Q. And your position is again?

A. That the -- that given the nature of the claims, because the claims fundamentally relate to clustering and the withholding of DBS, they transcend the boundaries of any individual household. So I regard the DMA as the right way to think about the issue.

Q. All right.

A. Like the geographic market with which to think about the issue.

Q. And that's basically the dispute. Let's put some context to the dispute --

A. Yes, sir.

Q. -- Dr. Williams.

(Pause.)

[Page 209]

A. Yes.

Q. Find what you need to find.

A. Yes.

Q. In context, is market definition a necessary inquiry for your market performance analysis?

A. No, it is not.

Q. When we engaged you, and describe the claims in this case, did we also tell you that there was arising from the Swafson (ph) Section 1, a claim under Section 1 of the Sherman Act?

A. That's my understanding.

Q. Is market definition relevant to the claim under Section 1 of the Sherman Act?

A. You know, I'm not an attorney, but my understanding, based on my experience, is that Section 1 Claim under the Sherman Act is a per se violation. And, no, from -- certainly from an economist's perspective, does not require any definition of a relevant anti-trust market.

Q. All right. What's the second dispute between you and the defendant's experts?

A. I think it -- it -- so now let's go back to that first performance study. Again, we're back to the DBS issue. I think that, as I understand it, Defense experts just dispute the basic finding. They dispute that Comcast's withholding of Sports Net in Philadelphia has, in fact, reduced DBS **[Page 210]** penetration rates or that it has, in fact, had an effect on increasing Comcast rates to its subscribers.

Q. But do they read the literature differently than you do?

A. I presume that they must.

Q. And at least with respect to some of that, have the defendant's experts performed some empirical research?

A. On the first issue, that is Dr. Chipty has performed an econometric study of whether or not the withholding of Sports Net Philadelphia has effected penetration rates, I don't believe that any Defense expert has performed any econometric study of the last issue, whether or not -- whether or not a reduction in DBS penetration rate actually has led to higher Comcast Cable rates.

Q. All right. And what's the third major area of dispute between you and the defendant's experts?

A. Sure. So the third one is, again, harking back to where we were a moment ago, the -- the large body of economic literature on that subject of, Is there a relationship between large clustered systems and cable rates? And I believe that Defense experts certain dispute that conclusion, that all other things equal large highly-clustered MSOs charge higher prices.

Q. And then the fourth and the fifth and the sixth areas of key disputes?

A. Sure. So the fourth, and now we are actually matching **[Page 211]** up with our table numbers here, the fourth would be that they would dispute that, as I mentioned on Page 22, that they would dispute the finding that -- I'm sorry, I misspoke -- I meant Table 5, which is on Page 29. I apologize.

So that was really the, Is there a relationship between clustering and overbuilding or does clustering, all other things equal, reduce overbuilding? And I believe Defense experts dispute that conclusion.

Q. All right. Fifth?

A. The fifth would be on -- on Table 6 on Page 32 where the question is posed, All else equal, does an increase in bargaining power resulting from clustering by MSOs lead to higher cable rates? And there's a dispute between me and Defense experts on that subject.

And, finally, this would be touched on on Table 7 on Page 34, there's a dispute regarding the role, if any, of benchmark competition, that is has the clustering reduced benchmark competition in a way that would result in higher cable rates? There's certainly a difference of opinion on that subject.

Q. All right. You've testified, and I've emphasized, but you've testified that market definition, I want to turn to market definition --

A. Sure.

Q. -- Dr. Williams, and you testified that market [**Page 212**] definition is relevant only to your market structure analysis, and not relevant to your other analyses.

A. That's correct.

Q. But let's start at the beginning then. Can you explain to the Judge generally, if you can, that market definition is not necessary every time an economist goes out and does an investigation, then why doesn't an economist define the market? What is an economist doing in terms of purpose in defining a market?

A. The -- what I'd like to do, your Honor, is read two short sections from two, in my opinion, really kind of eminent experts on market definitions, that I think kind of T's up Mr. Goldberg's question, What is it that we're, as economists, what is it we're trying to do when we're defining the market, why are we doing this?

MR. GOLDBERG: It tells you, your Honor, how mature the area is where you have leading experts in the issue of market definition.

THE WITNESS: Actually it dates back almost 50 years now.

MR. SHUSTER: Can I have, if the witness is going to read from the document --

MR. GOLDBERG: He's actually reading from his report. MS. SHUSTER: Where?

[Page 213]

BY MR. GOLDBERG:

Q. Go ahead.

A. I was just about to tell you. I am in my expert reply declaration, and I'm on Page 26 in Paragraph 48, and I'm going to read a quote from Professor Steven Salla (ph) who's an anti-trust expert at Georgetown University.

Q. Go ahead, sir.

A. Quote, "Market power and market definition" --

THE WITNESS: I'm sorry, your Honor, I'm starting on Page 26.

THE COURT: Go ahead.

THE WITNESS: I'll start over.

"Market power and market definition therefore should not be analyzed in a vacuum or in a threshold test divorced from the conduct and allegations about its effects. Instead market power should be measured as the power profitably to raise or maintain price above the competitive benchmark price which is the price that would prevail in the absence of the alleged anti-competitive restraint."

And I'll come back to this at various points, but in particular his language about "should not be analyzed in a vacuum," you have to think about the claims that are being made in the case that you're working in order to properly define a relevant anti-trust market.

And the other quote that I want to read for your **[Page 214]** Honor is on Page 28 in Paragraph 50, and this is a quote from Dr. Gregory Warden (ph)

who is one of the chief economists at the U.S. Department of Justice, and he's a former colleague of mine, and also someone with whom I've co-authored a number of papers. He's widely regarded actually as the father of the horizontal merger guidelines -- just to be clear -- as the father of the market definition paradigm in the horizontal merger guidelines.

And Greg writes on Page 28 -- as I quote on page --

Q. Dr. Williams?

A. Yes, sir.

Q. Can you slow down just a little bit?

A. I'm sorry.

Q. Because it's not untypical when somebody's reading to go very fast and people have to record this.

A. Yes, sir.

Quote, "Market delineation in anti-trust is a means to an end rather than end in itself. Markets are tools used to aid in the assessment of market power related issues. The best tool for any task is one designed to perform it. A market delineated for one purpose may not be any more suitable for another than a dental drill is for coal mining or of mining drill is for dentistry. Assuring that markets are suitable for the purposes to which they are put requires that a preliminary step be taken before market delineation. **[Page 215]** This step is the identification of who might exercise market power against whom it might be exercised and how it might be exercised."

And I'm going to come back probably at more than one point to that last phrase that Dr. Warden used there, "how it might be exercised." Because if you think about it, that dovetails very nicely with what Professor Salla was talking about, Don't analyze market definition in a vacuum. Before you even begin the exercise, ask yourself, What are the claims? How might market power be exercised here?

Q. Okay. Well, let's see if we can help the Judge out here, because you've described you've got a dispute between you on the one hand and the defendant's on the other. You have a market definition that talks about this whole area, geographic, and they have market definitions at least at the start of 3 million or so tiny, tiny areas.

What do those references that you just quoted from the literature, how does that help the Judge decide who's right?

A. The way I think it helps is first let's start with Greg's admonition that market definition is a tool. It's something that you use to help you organize your thoughts to think about the issues. So in this case we have claims that plaintiffs' admit. They may be right. They may be wrong. But from an economist's perspective, at least you want a tool **[Page 216]** that helps you think about whether they're right or wrong.

And, so, in my opinion, given the nature of plaintiff's claims, that is that the clustering, which has created through these nine transactions over this roughly a decade period, coupled with the withholding of Sports Net Philadelphia, the fundamental claim is that that has had an effect throughout a broad area.

Now, I'm using the phrase "broad area" on purpose as opposed to -- I don't want to leap right to the DMA. I'm just saying to me it's just intuitively clear that the effects of that, the alleged effects, because they might be wrong, but the alleged effects of it extend well beyond the boundary of any individual household.

But let's just posit for a moment that we were -- we were going to define the relevant market as an individual household. Any individual household, over the course of these nine transactions, is unlikely to have any change in who the cable subscriber -- who the cable provider was.

So if we looked at the market concentration at that household, it would be 100 percent from one in year one, and probably 100 percent from one in years 2, 3, 4, 5. There wouldn't be any change in market structure at that individual household.

And yet if plaintiffs are right, and I'm not saying that -- that -- for the purposes of defining the market you **[Page 217]** want to assume plaintiffs' right, but you at least want to define a market in a way that lets you analyze whether or not they might be right.

If plaintiffs might be right, then the price effects are flowing from conduct that extends well beyond any individual household.

Q. Why do you say that?

A. Because it depends on all those performance studies that we just went through, your Honor. Is it true that clustering leads to -- clustering by large MSO, all other things equal, leads to higher prices. So does the cluster itself lead to higher prices? Does the withdraw -- does the withholding of the Sports Net Philadelphia, does that lead to a higher

price throughout the whole Philadelphia DMA area? Can you actually study that issue one household at a time?

And in my opinion, that's not a very helpful tool. To think, I'm going to study 3 million separate markets to try and understand whether or not the -- the claims -- again, come back to Greg's phrase, How might market power be exercised? The how here is -- and this is really where the big dispute is between, in my opinion, plaintiffs' experts and Defense experts, Defense experts I think fundamentally take the position that the nature of competition, the how is cable companies compete if they're overbuilt. If they actually have lines running -- two companies running by the **[Page 218]** same house. That's when they compete.

But I think at a fundamental level they just dispute the proposition that there's really an other form of competition, that this clustering could lead to higher prices, or the withholding of Sports Net of Philadelphia could lead to higher prices. In other words, that competition, competitive effects could happen because of the clustering.

THE COURT: Well, how about the franchise areas.

THE WITNESS: Mm-hmm.

THE COURT: I've seen she has used that approach.

THE WITNESS: Absolutely, your Honor. In the Adelphia -- and let me just -- let's talk about that for a moment. In the Adelphia order the commission said, first they said, For purposes of analyzing the transaction they were looking at, which was a prospective acquisition by Comcast of the Adelphia

properties -- notice before we go any farther -- that's a very, very different set of analyses that they're asking than we're asking here. We're asking what's the cumulative effect of nine Swafson acquisitions coupled with the withholding of Sports Net Philadelphia, viewed retrospectively.

So just to begin with, they're looking at -- they're asking themselves a very different question. On a prospective basis, what's the likely competitive effect, if **[Page 219]** any, of the transfer properties that were involved in the Adelphia order.

And they asked themselves the question, Okay, what unit of observation -- what geographic market should we define to think about that particular issue? They said we think that the right geographic market is an individual household, but that's impractical, because there's just too many households. So we're going to aggregate that up to an LFA

I -- look, I don't have an opinion specifically on whether or not the FCC was right or wrong in what they did in their analysis of the Adelphia order. That's not what I've been asked to look at. I've been asked to look at a very different set of allegations.

In this set of allegations, let's say we did exactly that. Let's say we took exactly that approach. And instead of looking at 2.9 million different geographic markets, we aggregated each of those up to the LFA level. I don't remember the exact number. There's about 600 LFAs in the Philadelphia DMA

And now let's ask ourselves the question, Would that help us understand the plaintiffs' claims? What kinds of changes in market structure would we find if we defined 600 different relevant geographic markets?

Well, the first thing to recognize is that there are **[Page 220]** very few LFAs in which you have more than one cable supplier in a non-overbuilt circumstance. So, in other words, if you looked at the nine transactions over that decade and you ask yourself for a -- just pick some LFA, number, you know, the first LFA out of the 600 -- what would be the market share of the incumbent supplier?

It's probably 100 percent. And it will probably be 100 percent after the first transaction, after the second transaction. Nothing is going to change from a structural perspective. The same probably -- well, just to be clear. The name of the company might change, but what won't change is whether or not there were one or two suppliers going to that house, all within that LFA to be clear.

I -- there may be -- I don't know this for a fact -- I believe that there might be a handful of LFAs in the Philadelphia DMA that actually have more than one cable company in the same LFA that are not overbuilt. So in that LFA, if those two -- let's say one of them is -- for the sake of argument -- let's say one is Comcast and one is a non-Comcast firm.

In that LFA, you would have a change in market structure, because the Comcast Company would be acquiring the non-Comcast company. So the market shares would change from whatever they were, whatever share the households they served in that LFA before the acquisition to 100 percent after.

[Page 221]

But for the vast majority of the 600 geographic markets, there would be -- the Herfindahl would go from 10,000 before the acquisition to the 10,000 af-

ter. In other words, there would be no change in market structure.

So let's say we did all that analysis, and we finish up and we say, I've got, okay, I've got a handful of instances in which the market structure changed in the LFA, hypothetically, if there are, in fact, some examples where there's more than one cable company in an individual LFA, but they're not overbuilt, but in the vast majority of them are -- there was no change in market structure.

Again, think -- remember what you do in a structure analysis, you ask yourself fundamentally, I can't -- I'm not going to forecast any change in the ability of a firm to exercise market power if there's no change in market structure. So if -- in the vast majority of these LFAs, there wouldn't be any change in market structure, which means that necessarily my conclusion would have to be, I don't think the competition could have been harmed by any of these acquisitions, because the market structure didn't change in any of them.

And what that means is that because of the way you define the market, you're inevitably led -- the market definition has preordained the outcome. You inevitably would be led to a conclusion that the Swafson acquisitions didn't **[Page 222]** harm competition, because there would be no change in the structure of the vast majority of those 600 relevant anti-trust markets.

THE COURT: Dr. Teece, as I understand it, approaches this topic by making what he refers to as a very significant meaningful distinction in the concept of competition, the twists and turns of the actual competition, the potential.

THE WITNESS: Okay. You're talking -- I'm sorry, who did you say did that?

THE COURT: Dr. Teece.

THE WITNESS: Okay.

THE COURT: Dr. David Teece.

THE WITNESS: Teece.

THE COURT: That's my recollection.

MR. SHUSTER: Teece.

MR. GOLDBERG: Teece.

THE COURT: Teece, okay. That's my recollection. He takes on your market approach initially by making a distinction between actual competition and potential competition. And then he says that, as I understand what he says anyhow, so far we haven't heard his testimony --

THE WITNESS: Yes.

THE COURT: -- but I read his report, a little knowledge is a dangerous thing -- but he says that you get **[Page 223]** all twisted. Sometimes you make that distinction. Sometimes you don't make that distinction.

You make that distinction only when it serves your benefit to reach the result -- to reach the plaintiffs' result.

THE WITNESS: Okay.

THE COURT: What about that?

THE WITNESS: The -- well, let's start at the beginning, and recognize that any criticism of the market definition approach that I've made --

THE COURT: We're talking horizontal restraints, the --

THE WITNESS: Yes, Blanchsted (ph), yes.

All I was going to do, your Honor, just to preface my answer was say, Remember that any criticisms of the market definition approach by definition can't apply to any of the market performance analyses that I've performed. By definition they only apply to one study, which is the one I mentioned at the outset, that my opinion that Comcast has a market share, and that's, of course, what's in dispute here insofar as the structural studies being discussed, that Comcast has established a market share in the neighborhood of 65 to 75 percent in the DMA, okay?

And insofar as -- I think I know what you're talking about when Dr. Teece talks about actual competition. The way **[Page 224]** I read Dr. Teece is by actual competition I believe he means overbuilt, and by potential competition I believe he means -- and obviously if I did this wrong he will certainly correct me -- but I think, for example, based on competition or perhaps a threat of overbuilding. In other words, something where the cable companies are not actually -- have two lines in front of the same house.

THE COURT: That's right.

THE WITNESS: Okay. I guess I would say I regard those a little bit of a misreading of what I've done, because those comments, if you think about the discussion we've had this afternoon, a lot of that actually goes to the performance studies, and the performance studies don't depend on any market definition.

The structural study really -- what you do is you -- if the dispute is that is the structure of the rele-

vant markets, then Dr. Teece's approach -- because he does argue that, in his opinion, it would make sense, because it's impractical to have 2.9 million geographic markets, so he says, I think that it would be practical to aggregate up to the LFA level.

And, so, as I said, if you did that, you would -- you would come to a very different conclusion than I have come to. You would conclude that, in fact, the Swafson acquisitions have not really changed the market structure in **[Page 225]** any of these 600 markets. As I said, there might be a handful where it would change, but I think -- I think your conclusion would be, No, I don't believe that there's been any important changes in market structure, and that's really focused on the actual competition aspect of it, right?

And, so, I think that is a -- it certainly is a dispute between the two of us. His position is that the LFAs are at market, minus that the DMA is the right market. His conclusion, based on studying 600 LFAs would be, There hasn't been any important change in market structure. Therefore -- I don't need to speak for him, obviously if I get it wrong he'll please correct me -- but I think he would draw from that conclusion that there are no important changes in actual competition -- to use the phrase you just used -- or, in other words, there is no change in the market structure of the actual cable companies that are in a given LFA.

And for that reason, I believe Dr. Teece would come to the conclusion that based on a structural analysis, I think he has reached the conclusion that the Swafson acquisitions have not diminished the level of actual competition in any well-defined antitrust market.

And that's obviously where we have a dispute. I think that that's a misreading of what's referred to as sometimes as the smallest market principle, where the smallest market principle means -- just as an aside, what **[Page 226]** happens sometimes -- your Honor probably knows this -- but in many mergers that the DRJ reviews, or the FCC reviews, parties come in and say -- let's say it's a merger between two companies that make bread -- and the parties will come in and say, The relevant product market is all food. Because obviously they're going to have a small share in the market for all food. So this is a standard right. Parties tend to argue for much broader markets.

We actually have a little bit of an irony here, I'm arguing for a bigger market than Dr. Teece is. But I don't believe that -- thinking about -- again, harkening back to the Salla and Warden quotes, I don't personally find thinking about those 600 individual LFAs. I don't find it very helpful to -- I don't find it a helpful tool to think about plaintiffs' claims, because plaintiffs' claim at a very fundamental level, transcend individual LFAs. That is the alleged competitive effects.

So I think you're right. I think that actual competition is certainly a difference of opinion between me and Dr. Teece, and insofar as potential competition, I guess I would say -- to me that's -- that's really spilling over into the performance studies, where I talked about the -- arguably the potential --

THE COURT: Well --

THE WITNESS: -- of benchmark competition.

[Page 227]

THE COURT: -- if we're talking about potential competition --

THE WITNESS: Mm-hmm.

THE COURT: -- we've got to assess the likelihood that there would be competition.

THE WITNESS: Absolutely.

THE COURT: And doctor -- and Dr. Teece testified --

THE WITNESS: Teece.

THE COURT: Teece. And Dr. Teece, on his many conclusions, is very careful about holding you to the premise that if we're talking about an area in which there's no competition, you've got to establish that there can be -- that there can be competition in that area.

THE WITNESS: Right. And just to be clear, when you said no competition, I think -- tell me if I'm right -- I think you meant no actual competition.

THE COURT: Exactly, no actual competition.

THE WITNESS: They're not actually overbuilt.

THE COURT: Correct.

THE WITNESS: Right. And you're absolutely right. You're absolutely right, your Honor. And that comes back to what I mentioned was -- do you remember I went through what I regard as the six key disputes, and four of them really relate to the issue you've just raised, which is, Is it true that -- is there, in fact, a large body of economic **[Page 228]** literature showing that, all other things equal, highly clustered systems, owned by large MSOs, in fact, charge higher prices all else equal? Because notice that that's addressing that exact issue, because what

it's saying is, Even though the level of actual, even though the level of overbuilding hasn't changed, even though there's no more actual competition, when I aggregate up these systems, when I make this large cluster, what the -- in my opinion -- the weight of the empirical evidence is that leads to higher prices.

And so some form of competition is being reduced. It may be -- I've outlined several ways in which that could happen, and I've offered two different economic theories explaining how that could happen, through either reduced overbuilding, reduced or enhanced bargaining power through the bargaining theory of Professor John Nash from Princeton University, or reductions in benchmark competition.

And we could have disputes about that. Somebody could say, I don't like that theory. I dispute this part of that theory. But in my opinion, the one thing that at least I regard as really not in dispute, to me anyway, is that there is, in fact, a very large body of econometric literature demonstrating that there is a positive relationship between clustering and price.

And so some form of competition is being eliminated **[Page 229]** as that clustering occurs, and it's not eliminating actual competition, because we're not reducing the amount of overbuilding, that's not what's going on. Some form of competition is being eliminated because that's why the price is going up.

As I said, I've offered several theories that I think explain exactly why that could happen, but I don't regard it, in my opinion, as really in dispute that it is happening.

THE COURT: Well, we could explain it in part by advanced technology and the offering of more services.

THE WITNESS: You could try. I think what you'll find, though, when you read through the econometric literature is that -- I think as Dr. McClave explained, and certainly this is explained in detail in more reports and Dr. Singer's reports -- is that many of these econometric regressions -- what you're saying is a very common sense point, and people have -- have said, You're right, maybe it's more advanced services, maybe it's higher costs, maybe it's higher income. If you look through all those regressions, you'll see that econometricians -- and I'm not saying they've always got it right -- but they've certainly undertaken efforts to hold those things constant in the framework of a multiple regression model.

So, again, what they've tried to identify is, Is it [**Page 230**] true that all else equal, with all else equal being exactly what your Honor just identified, things like more advanced services, or higher cost areas, or are there -- a whole host of things that they've attempted to hold constant, and yet continue to find for more than a decade this relationship appears to continue to hold.

BY MR. GOLDBERG:

Q. Let me see if I can ask you some questions to summarize some of this, and that is: Are you saying, Dr. Williams, that what you -- what you learned from Profession Warden and Professor Salla is that you should define the market, the geographic market in such a way to allow you to observe or not observe whether there is a diminishment of competition because of the conduct complaint?

A. Yes, I think that -- I think that's exactly right. When you're defining a relevant anti-trust market, you have to at least define a market that gives you a chance, or a good tool, the opportunity in other words, to study the claim. It doesn't mean the claim's right. It doesn't mean it's wrong. But at least you have to define a market that will let you answer Greg's questions, Who, whom, and how?

If you define a market in a way that doesn't let you get at those things, then as I said, I think you've just preordained the answer.

Q. Let me ask you a couple of questions, because you have **[Page 231]** provided to the Court, and to the Judge who's going to have to make some preliminary decisions here, you've provided some economic theory that might help define what the competitive mechanics are, and benchmark competition is an example.

A. Yes, sir.

Q. If the Judge wanted to decide who was right here, Dr. Williams or Dr. Teece, as to whether there really is benchmark competition going on, can he determine that just by looking at a household?

A. I don't see how, and I don't see how you could determine it by looking at an LFA either.

Q. Well, explain to the Court why you cannot look just at the household or just at the LFA to determine whether there's real benchmark competition going on?

A. Well, let me clear up two things. One is that -- I take it back. The claim regarding benchmark competition is that the reduction in the number of cable companies has reduced the number of

places that regulators, firms, and consumers look to to see what the neighbor next door is paying. And there certainly is a dispute -- I don't mean to minimize -- there certainly is a dispute between me and Defense experts about whether or not that's a real phenomena, whether or not it actually takes place in cable markets, but if you at least want to give yourself a fighting chance to ask the question, and think about it clearly, if you looked -- if you defined **[Page 232]** the relevant markets to be either an individual house, 2.9 million of them, or an individual LFA, and you did it one -- remember, what it really means to define a relevant market is you're saying that that market encompasses everything I need to look at in order to study some particular claim.

So if I look at the first of my 600 FLAs and I ask, Can I actually understand whether or not there's been a diminution in benchmark competition, I don't know how you would do that, because the fundamental nature of the claim is that the diminution in benchmark competition has happened --

THE COURT: Well, I thought the FCC did it.

THE WITNESS: Oh, on benchmark competition?

THE COURT: Yes.

THE WITNESS: Well, what they did, they -- I think if you look at -- are you talking about the Adelphia --

THE COURT: Yes.

THE WITNESS: -- order, your Honor? Yes. So what they did, if you look at the Adelphia order, first they did a structural study, and they said, We think the relevant market is an individual house, but it's impractical, so we'll aggregate up to an LFA.

After that they turned to the question, because some people filing comments in that merger had said, You, the FCC in the past have placed great weight on benchmark competition, and you've just forgotten your own opinion.

[Page 233]

And the FCC said, No, we haven't forgotten about it, but it wasn't part of their structural study. That was now -- because the benchmark competition fundamentally is, that's a performance --

THE COURT: Performance.

THE WITNESS: -- study. And really, you know, it doesn't, by itself, if that's what you're analyzing, you don't need a market definition to study that particular issue.

But -- so just to answer your question specifically, then -- I think if you look at the Adelphia order again -- what you'll see is that they discuss benchmark competition after they've done their structural study, and respond to the parties that comment and say to the FCC, have you forgotten your own opinion, because you used to say benchmark competition was very important.

And the FCC acknowledges that, Yeah, we think benchmark competition is important. I think they basically say something like, and we recognize that it may be diminished in this matter, but I think the phrase that they used was, We can't quantify the reduction in benchmark competition in this particular transaction, so we're not going to -- in the Adelphia order -- we're not going to challenge the transaction because of the diminution in benchmark competition.

[Page 234]

THE COURT: How much more time do you need to finish your direct examination? That's just an inquiry, Counsel?

MR. GOLDBERG: It's possibly I could get it done within 20 minutes, but I'm not sure.

THE COURT: All right.

MR. GOLDBERG: I'll proceed and try, your Honor, how's that?

THE COURT: Fine.

BY MR. GOLDBERG:

Q. Let's take, as an example, when the FCC, because Judge Padova asked, when the FCC was assessing -- I'm having too much fun up here thinking about the subjects such as market definition at 4:15 in the afternoon -- when the FCC was analyzing--

A. I think it's exciting.

Q. -- the denial of RSN to DBS providers --

A. Yes.

Q. -- did the FCC adopt as the geographic area of inquiry households?

A. No, they didn't.

Q. So they didn't analyze what would be the competitive facts of either diminishing or increasing or leaving competition levels the same by looking at households. Did they look at the LFAs?

A. No, they didn't.

[Page 235]

Q. What did they look at?

A. They looked at the DMA, which makes sense, because that's -- that's the unit of observation in which -- and let's talk for a second about what is a DMA? A DMA -- it's not an ad hoc thing. It's actually a -- it had a fundamental importance in business, because it's -- it was actually invented by Neilson. In other words --

Q. Neilson is who?

A. Neilson's the large advertising company. Neilson invented DMAs. They -- in fact, there's a footnote in my -- I believe in my first report where we talk about Neilson essentially bragging about why they think DMAs are so important.

And what they say is, Look, our advertising -- people that want to advertise -- and, of course, that's a multi-cabillion dollar industry of -- the advertising industry -- they care about reaching people with common interests.

We have split the country into 210 DMAs that really from an advertiser's perspective, help advertisers reach people that -- that do have fundamentally a lot in common, and in particular, a lot in common in the sense that -- and I'll speak a little into it here I hope -- but they care about the same sport teams, or they want to see the same evening news locally. They want to know, you know, are my **[Page 236]** schools closed tomorrow, or what's the weather going to be tomorrow? There's a commonality of interest there and that's why advertisers care about DMAs.

So what I'm saying is, It's not an ad hoc line that some bureaucrat drew some place. DMAs were invented by companies that cared deeply about getting it right, where it is, What is an area in which -- from

-- in the sense from a demand side perspective, there is a commonality of interests, and that's what -- that's how DMAs got invented.

And just to finish the answer to Mr. Goldberg's question, when the FCC -- and you'll read this in detail in the 2007 Program Access Order, when they ask the question, How big does a -- what percentage of homes pass, in a geographic area, does a cable company have to pass in order to find it profitable to withhold must have sports programming.

And they immediately say -- they immediately start referring to the DMA market. And the reason that that -- the reason I think that's a sensible thing to do is because that's -- that's where the -- as I said, kind of the commonality of interest applies.

And so what they did was they said, Look, there's a little bit of arithmetic that it went through. In fact, actually Mr. Burke I thought did a very nice job this morning, or this afternoon, of explaining that trade off, **[Page 237]** that from the perspective of Comcast, they have a choice to make. They can either make a lot of money by selling Sports Net Philadelphia to the satellite companies, or they can ask, How much money will we make if we don't sell it to them?

And that depends critically on what -- how big are they in the DMA. Just intuitively you can, I'm sure, see the answer for yourself already.

If you own Comcast, and Comcast was a small part of the DMA, it doesn't make any sense to withhold the programming, because you make a lot more money selling it to the satellites than you would capturing the gain if you had just a small part of the Philadelphia DMA.

So the bigger, the more and more you've clustered, the more and more profitable it is for you to withhold the Sports Net. It's exactly what's laid out in the FCC's 2007 Program Access Order. And it's all done with the geographic unit of analysis being the DMA, because that's the right way to think about it.

MR. GOLDBERG: Your Honor, I apologize. Can I take just about a minute-and-a-half?

THE COURT: Go ahead.

MR. GOLDBERG: Otherwise, I'm going to be bleeding on your floor.

THE COURT: Okay.

MR. GOLDBERG: Okay.

* * *

RECORD
AND
BRIEFS

No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,

Petitioners,

v.

CAROLINE BEHREND, ET AL.,

Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit**

JOINT APPENDIX
Volume 2 of 5
(Pages 402a-815a)

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW BEHREND, et al.	:	CIVIL ACTION NO. 03-6604
v.	:	Philadelphia, Pennsylvania
COMCAST CORPORATION, et al.	:	October 15, 2009 10:22 o'clock a.m.

. . . . . .

HEARING

BEFORE THE HONORABLE JOHN R. PADOVA

UNITED STATES DISTRICT COURT JUDGE

* * *

[Page 3]

(The following occurred in open court at 10:22 o'clock a.m.)

THE COURT: You're still under oath, you understand that?

THE WITNESS: Yes, sir.

MICHAEL WILLIAMS, Plaintiff's Witness, Previously Sworn, testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. GOLDBERG:

Q. Good morning, Dr. Williams.

A. Good morning.

Q. Yesterday, Dr. Williams, in your testimony you described to the Court how you found higher

prices in the Philadelphia DMA and then, through your market structure and market performance analysis, you found that Comcast had market power in the Philadelphia DMA. This morning, I'd like to ask you to connect those two for Judge Padova and explain to Judge Padova how Comcast's market power, in the DMA, causes the high prices that we see. What's the mechanism that causes the high prices that we see in the Philadelphia DMA?

A. So, there are four, usually, non-exclusive mechanisms. The first is the withholding of Comcast SportsNet Philadelphia from the satellite providers. That has the affect of reducing the DBS penetration rates throughout the Philadelphia DMA and resulting in Comcast increasing its **[Page 4]** rates throughout the Philadelphia DMA. With the finding that the FCC has made that that has caused a material, adverse impact on competition.

As Comcast has clustered its systems, that has also increased Comcast's incentive to continue to withhold Comcast SportsNet, Philadelphia from the satellite providers and has enabled Comcast to capture more of the monopoly profits created in the first instance by the withholding of the SportsNet Philadelphia from the satellite providers.

Q. Would you explain to the Judge why the clustering increases Comcast's incentive, as you described to deny the regional sports network?

A. Yes. That occurs, as is laid out in the 2007 program access order. Because as Comcast's share of the DMA increases, it is able to capture a greater and greater percentage of the monopoly profits that were previously, some of which were previously accruing to non-Comcast cable systems, also located in the Philadelphia DMA.

Q. Okay, so, that's the first mechanism. When you said they were non-exclusive, explain to the Judge what you meant.

A. I just meant that all four of them could happen simultaneously, because -- just because one mechanism occurs, doesn't mean the other three can't. In fact, all four could be operating at the same time.

Q. And have you found evidence of each of these four **[Page 5]** mechanisms that you're going to describe, in your investigation in this case?

A. Yes, sir.

Q. Okay, that's the first of the four. Turn to the second of the four mechanisms that connects Comcast market power that you found in the DMA to the higher prices in the DMA.

A. So, the second mechanism is the connection between increased clustering and decreased likelihood or probability of over-building. My reports lay out several mechanisms, several models under which this can happen, that are consistent with the economics literature on relationship between clustering and high prices and demonstrate that the likelihood of over-building falls as the clustering increases.

Q. That's the second of mechanisms. Now turn to the third mechanism by which this market power that you found in your structural analysis and in your market performance analysis, how that is connected to the high prices for DMAs, I'm sorry, for MVDP services in the DMA.

A. Yes, the third mechanism is the effective clustering on Comcast's bargaining power in a

particular -- in its -- that provides a powerful incentive and ability for Comcast to increase its rates to its rate pairs in the negotiations with its upstream content providers.

Q. Okay, so, let's stop for a second and do it piece by **[Page 6]** piece.

* * *

[Page 10]

Q. More of them knew about other prices than their own --

A. Right.

Q. -- than here in Philadelphia?

A. That's exactly right, which made intuitive sense to me

because those cities are less clustered.

Q. All right, what else did you learn from your survey?

A. The second part to the survey was that each of the 1,600 cable subscribers from the four cities was asked, if you became aware of price differences or different service offerings on a cable system other than your current incumbent cable system, would you be likely to take some action to make a phone call, call a regulator, complain to your local cable company, take some action. And the result was that that willingness to take some action was really uniform across the four cities.

Q. There was no difference?

A. No, there was no difference.

Q. And were those findings consistent with the well recognized economic hearing of benchmark competition?

A. Yes, sir.

Q. Okay, thank you, Dr. Williams.

MR. GOLDBERG: Pass the witness, your Honor.

CROSS-EXAMINATION

BY MR. SHUSTER:

Q. Good morning, Dr. Williams.

[Page 11]

A. Good morning, Mr. Shuster.

Q. I think you testified a moment ago that you found that prices in the Philadelphia cluster were higher, did I understand that correct? Yes or no?

A. Yes, that's part of my --

Q. Okay, did you conduct any sort of empirical study, yourself, of prices in the Philadelphia cluster comparing it to prices elsewhere?

A. I did not.

Q. So, when you said you found that prices were higher here, it was not based on any empirical study that you, yourself, conducted?

A. That's correct.

Q. Yesterday, you testified that it can be disputed whether clustering reduces over-building, increases marketing power and reduces benchmarking. Do you recall that?

A. Generally, yes, sir.

Q. You recall that you said that yesterday in this courtroom?

A. Yes, sir.

Q. But you also said that there is a positive relationship between clustering and price and that is not subject to dispute, that's what you said, right?

A. I certainly said it was my opinion that the weight of the economic evidence reached that conclusion, yes.

[Page 12]

Q. No, sir, what you said, the words you used yesterday, was that those other points were subject to dispute, but the proposition that clustering is correlated with higher prices is not subject to dispute. Isn't that what you said yesterday?

MR. GOLDBERG: Objection, your Honor, argumentative.

He could ask what the witness recollects. He can't say, no, that's not correct.

THE COURT: Objection overruled.

THE WITNESS: I don't specifically remember saying those words, but I mean, I don't dispute it necessarily.

BY MR. SHUSTER:

Q. And the impression you were intending to give the Court is that the economic evidence is overwhelming to support a finding by this Court, that common issues predominate on the question of antitrust impact, right?

A. Well, certainly it's my opinion that they do.

Q. Right and you were saying what you were saying to the Court to persuade the Court of that?

A. It's certainly my opinion that that's the correct --

Q. Now, you know that -- you know that we do dispute the proposition that clustering is correlated with higher prices, you understand that?

A. I understand that Dr. Chipty certainly disputes that, I believe Dr. Teece does as well.

[Page 13]

Q. Okay. Now, you testified that the approach you're taking here is consistent with the approach that the Department of Justice and the Federal Communications Commission take when evaluating competitive circumstances, right?

A. Yes, generally.

Q. Well, that's what you said yesterday, twice, right? A. Yeah, those specific questions to me related to my using a broad set of existing empirical literature, yes, sir.

Q. And you were saying that in part to explain why you hadn't conducted empirical studies of your own here, right?

A. In part, yes, sir.

Q. Now, you think that's important that what you are doing here is consistent with what the DOJ and the FTC do or you wouldn't have mentioned it, right?

A. It was certainly consistent with my experience of the trust department.

Q. But that's -- I'm asking you a different question. You think it's important what the DOJ and FTC do and have done, you think is an important reference for this Court?

A. That wasn't actually what I specifically intended to communicate with that. I was just saying it was my experience.

Q. So, when you said that what you were doing here is consistent with the DOJ and FTC do, you weren't intending to suggest to the Court that how the FTC and the DOJ do it, is a **[Page 14]** useful and important reference?

A. No, I agree with you. It's, I think, it's useful to point out.

Q. Now, by the way, the DOJ and the FTC do frequently conduct original empirical research when evaluating mergers, transactions, issues of market power, correct?

A. That was certainly my experience when I was there.

Q. They don't only do structural studies of the kind that you've described?

A. I would say, in the context of mergers, the vast majority of the studies are structural.

Q. But they do do regressions, pricing regressions?

A. Absolutely, when the data are available, they absolutely do.

Q. Well and they have ways of getting the data, don't they?

A. Sure, through the CID process.

Q. You're saying the Civil Investigative Demand process?

A. Yes, sir.

Q. And in addition, when parties file for -- file for approval to go ahead with mergers under the Hart Scott Rudino statute, the DOJ and the FTC have second request authority?

A. They certainly do.

Q. Right and we'll talk about that in a second. Both of them have economists on staff, the DOJ and the FTC?

A. Yes, sir.

[Page 15]

Q. And good ones?

A. Outstanding ones.

Q. Now, every single transaction that is at issue in this case, was reviewed and approved or at least, not challenged, by the DOJ or the FTC, correct? You're looking at counsel, counsel can't help you with that.

A. No, I'm sorry.

Q. You have to answer the question based on what you know.

A. I'm sorry, I was not asking for his help. I don't have my glasses on and I could see he was moving.

Q. I see.

A. Yes, the transactions were not challenged by the DOJ or

FTC.

Q. In fact, every single acquisition or swap in the cable industry, that has led to increased cluster size, has been reviewed by either the Department of Justice or the Federal Trade Commission, correct?

A. Is that a question?

Q. That's a question.

A. Yes.

Q. And there have literally been hundreds such transactions, correct?

A. That's my understanding.

Q. And clustering has been going on for 20 years or so, right?

[Page 16]

A. That's my understanding.

Q. And there are 80 to 90 clusters in the United States of 100,000 or more subscribers, right?

A. That's my understanding.

THE COURT: Those reviews are done for antitrust impact purposes, among other things?

THE WITNESS: They would be done to study whether or not that particular merger would be likely to lead to anti-competitive --

THE COURT: The answer is yes?

THE WITNESS: Yes, sir.

THE COURT: Okay.

Q. Well, when you say that particular merger, Dr. Williams, the FTC and the DOJ, when evaluating proposed mergers or acquisitions or swaps, make a concerted effort to anticipate the

overall competitive affects in a defined geographic and product market of the transaction, right?

A. Of that particular transaction, that's correct.

Q. Right. But, I mean, it was not -- it did not escape, it could not have escaped the attention of the sophisticated economists and lawyers at the Department of Justice and the Federal Trade Commission, that one of the issues in cable system mergers, acquisitions and swaps was clustering, correct?

A. I would be surprised if that was -- I don't know for **[Page 17]** certain that they considered that, but I would be surprised if they didn't.

Q. That would be a pretty big boat to miss for 20 years, right -- to miss that boat?

A. Yes, sir.

Q. Right. And may of -- and in addition to the 80 to 90 clusters of 100,000 or more, Dr. Williams, there are innumerable clusters of smaller sizes, correct?

A. Yes, sir.

Q. Many of them are the product of multiple transactions just like the Philadelphia DMA cluster that's at issue here, right?

A. That would be in my expectation.

Q. And there are clusters in the United States that are larger than the Philadelphia cluster?

A. I believe that's correct.

Q. And there are several of a comparable size?

A. I believe that's correct.

Q. And you know of not a single deal, in the cable industry, that resulted in the growth of a cluster, the increase in the size of a cluster, that has ever been challenged by the DOJ or the FTC, based on the theories you're espousing in this courtroom?

A. Well, that's a bit of a non sequitur.

Q. You know of no transaction that has not been -- you know **[Page 18]** of no transaction, in the cable industry, that led to an increase in cluster size anywhere that has been challenged by the DOJ or the FTC on any basis?

A. That is correct, yes.

Q. Including the theories you're espousing here today?

A. That's not correct.

Q. Okay. Nobody's challenged a deal, to your knowledge, it hasn't come to your attention that anybody has challenged a deal based on your theories?

A. That's not correct.

Q. Well, nobody's challenged a deal based on any theory, right?

A. That's correct.

Q. Now, we talked for a second about he Hart Scott Rudino Act, that's an act under which companies that intend to engage in a transaction that reaches the threshold set forth in that statute, have to give notice to the DOJ or the FTC, right?

A. That if they meet a certain threshold size.

Q. Right. So, the transactions were brought to the attention of the DOJ and the FTC?

A. If they met that threshold size, yes, sir.

Q. And then the DOJ and the FTC, if they wished to obtain more information concerning the transactions, have 30 days in which to issue a second request for information, right?

[Page 19]

A. That's correct.

Q. And in that second request for information, they're basically -- have the authority to seek, at least, as much discovery as the plaintiffs have obtained in this case, right?

A. That's correct.

Q. They can obtain documents, pricing data, market power information. They can conduct -- right?

A. Well, when you said market power information --

Q. Information that can --

A. -- that certainly is a little odd.

Q. -- lead them to make an evaluation whether there's market power? A. Yes, sir.

Q. They can and do take depositions of company personnel right? A. Yes, sir, they can.

Q. And other industry personnel?

A. Yes, sir.

Q. And you're familiar with the process at the DOJ and FTC, so you know that when two big parties want to merge or do a transaction or something, there's plenty of other interested parties

that come forward to the DOJ or the FTC with their views, right?

A. Absolutely.

[Page 20]

Q. The write white papers and they make an effort to make sure that the DOJ and the FTC haven't missed anything, right?

A. I'm not sure what you mean by haven't missed anything, but they certainly put forward their point of view.

Q. Right.

THE COURT: Well, Doctor, what do you suggest that I make out of the fact that the FTC and DOJ, which are obviously authoritative, according to your testimony.

THE WITNESS: Mm-hmm.

THE COURT: And commonly relied on in the industry, what will I make out of the fact or what can I make out of the fact that all of these transactions have been reviewed by FTC or DOJ and passed the review?

THE WITNESS: That is, first thing I would ask you to do, your Honor, is look in -- I think it's my rebuttal report, where I have responded to the testimony of Ms. Abernathy and Mr. Shalansky (ph). But the specific answer to your question is we have a very different set of facts in front of us today, than in any one of the transactions that Mr. Shuster is talking about. And in particular, the Government has to analyze those things necessarily on a prospective basis. Whereas, in this context, we had a

retrospective. In other words, we can view what has actually transpired in the market place.

Secondly, the transactions at issue in -- and this **[Page 21]** is a well-known problem in analyzing mergers, is the incremental effect of mergers. Here, we are analyzing the collective impact of nine large transactions and asking did the collective impact of that have an affect on competition? The Government never reviews nine large transactions, spanning a decade, in a single snapshot. They can't do that. So, they --

THE COURT: Yes, let's take that, what was the latest transaction that's involved in this case, that was reviewed?

THE WITNESS: I think the best one to talk about it would be the Adelphia Time Warner Comcast swap, whereby Comcast acquired Adelphia's cable systems in the Philadelphia cluster, because that was approved in 2006, your Honor.

THE COURT: All right, let's talk about Adelphia, unless you say that's not representative. Let's talk about that review. It was a 2006 review and it was a review which was made within the context of the market as it had currently, at that time, existed.

THE WITNESS: Yes, sir.

THE COURT: Now, at that point in time, what was the status of the clustering that's reflected by that chart?

THE WITNESS: That would actually be in a map in my second -- first or second reports -- I don't recall exactly. But there would have been some clustering, but in between **[Page 22]** these two amounts.

THE COURT: Okay. What's the last of the -- what transactions, give me some idea for the scope of the transactions that followed Adelphia, that relate to, you know, the conduct in this cause of action.

THE WITNESS: Sure, sure. There's a list of all the transaction in my first report, if I can find it for you.

THE COURT: Mr. Shuster, do you mind me --

MR. SHUSTER: No, no, your Honor, I was just pointing to a map that I think might assist your Honor. So, the Adelphia Time Warner swap, that's the black areas. Okay. So, the last deal we're talking about, this black -- these are the black areas. The rest of the cluster, your Honor, has been formed. This is Exhibit 2 in the Chipty Merits report.

THE COURT: Is it a plaintiff's exhibit?

MR. SHUSTER: It's a defendant's exhibit.

THE COURT: Okay.

MR. SHUSTER: Well, it hasn't been yet entered into evidence in this hearing, your Honor.

THE COURT: All right, give me --

MR. SHUSTER: Do we have a hard copy -- or it has?

It's in the Chipty report, in any event. It's in the first Chipty report.

THE COURT: Is that chart going to help us, Doctor?

[Page 23]

THE WITNESS: This chart right here?

THE COURT: Yes.

THE WITNESS: Oh, I think it does.

THE COURT: Okay. So, what we're saying now, at the time Adelphia was reviewed, does this chart reflect the territory or the cluster as it then existed?

THE WITNESS: This particular chart, your Honor, has all the transactions.

THE COURT: Okay.

THE WITNESS: Just shown in different colors.

THE COURT: Well, what transactions had not yet occurred as of Adelphia?

THE WITNESS: Well, you can see that the chart looks like it's in chronological order?

THE COURT: Right.

THE WITNESS: So, you can see it starts with Marcus Cable '98, in light green. Crater Media, '99, darker green and so on. So, the --

THE COURT: Adelphia closed in January, 2001?

THE WITNESS: Correct.

MR. SHUSTER: No, your Honor. Forgive me, I apologize. The Adelphia Time Warner swap, the Adelphia Comcast Time Warner swap, July --

THE COURT: July, 2006?

MR. SHUSTER: Yes. I think it's identified here as **[Page 24]** the Time Warner swap and it's --

THE COURT: It's the black?

MR. SHUSTER: Yes, that's the transaction where Time Warner and Comcast purchased the assets of Adelphia out of bankruptcy and then Time Warner and Comcast swapped certain areas.

THE COURT: So, at the time, Doctor, at the time that the Adelphia Time Warner swap was before -- was it DOJ or FTC, which was it or both?

THE WITNESS: I'm not, to tell you the truth, I don't remember exactly which agency reviewed it. I'm not

sure.

MR. KORPUS: FTC, Philadelphia.

MR. SHUSTER: It was the FTC for the Adelphia transaction.

THE COURT: Okay, so at that time, we'll use the FTC, which was July, 2006, the cluster was everything that's on this map, that's colored on this map, with the exception of the black areas. Is that correct, Doctor?

THE WITNESS: Yes. And there was the small picture you --

MR. SHUSTER: And your Honor, this black area is outside -- the one on the left of the map is outside the alleged geographic market. So, it's just the small black area that's in the middle of the map.

[Page 25]

THE COURT: Is that correct, Doctor?

THE WITNESS: That's correct.

THE COURT: All right. So, then when they looked at the Adelphia Time Warner swap, part of their interest was whether or not the additional acquisition or acquisitions would have antitrust impact, given the state of the territory, the state of the clustering, as it then existed. Is that correct?

THE WITNESS: That's correct, yes, your Honor.

THE COURT: And they concluded that it would not?

THE WITNESS: They did not challenge the merger.

THE COURT: All right. But is that the same as concluding that it --

THE WITNESS: I only made the distinction, your Honor, because the Government doesn't tell people why they don't challenge mergers.

THE COURT: Okay.

THE WITNESS: So, we don't know exactly what they were thinking, what we know is that they didn't challenge it.

THE COURT: So that, at that point in time, there isn't anything that was prospective, that was relevant to what affect the clustering was then having without Time Warner and what affect it would have in the future with Time Warner?

THE WITNESS: The analysis, by definition, is **[Page 26]** prospective. You're trying to forecast what you think likely will happen. Again, an important difference in this matter is the FCC and FTC review of that transaction didn't take into account, as part of the collection of conduct, the withholding of SportsNet Philadelphia.

THE COURT: Okay. And that would be the distinction. Any other distinctions?

MR. SHUSTER: I don't think that's an accurate statement.

THE COURT: Well, you're going to cross-examine.

MR. SHUSTER: Right.

THE COURT: Is that the only distinction you had for me with respect to --

THE WITNESS: Well, again, there's -- I would say that the -- there's really several distinctions. Number one, and this is a well-known problem for antitrust agencies, it's difficult for them to sequentially figure out when a merger is going to be. If there's a series of mergers, in an industry and you think about the holds on merger guidelines, each one might pass antitrust muster and yet, at the end of the day, the agencies might look up and say, had we known that all of these transactions were going to happen, we would have put a stop to it, at some point. So that, the fact that each one individually passes muster can be a problem. This is a well-recognized policy guideline.

[Page 27]

Secondly, again, we have the advantage of looking back retrospectively. We can observe and Dr. McClave specifically observed the changes in prices in the Philadelphia area compared to in his benchmark. And finally, as I've mentioned the plaintiff's Complaint, in this matter and part of the conduct is the SportsNet in Philadelphia.

BY MR. SHUSTER:

Q. Do you, are you not aware from having read all of the FCC reports, that the subject of SportsNet, Philadelphia was the subject of a major submission to the FTC -- the FCC in the Adelphia Time Warner transaction?

A. I am certainly aware that DirectTV and EchoStar (ph) made their positions well known to the FCC and FTC.

Q. So, it was considered?

A. Well, what was not considered was the FCC concluded -- I'm not an attorney -- but my understanding is that the FCC concluded they didn't have -- that Comcast had, because of the terrestrial loophole, it had, from a purely legal perspective.

THE COURT: No obligation to furnish the program.

THE WITNESS: Had not obligation to this.

Q. That's a different issue and you said to the Court that they didn't consider the vertical foreclosure issue that plaintiffs are raising here and they did.

A. No, I don't believe that's correct.

[Page 28]

Q. The FCC did?

A. I don't believe that's correct.

Q. Okay, you're -- the issue of SportsNet Philadelphia was put before the FCC by DirectTV and EchoStar in connection with the Comcast Time Warner Adelphia swap?

A. They certainly made their position known.

Q. Right. And you don't know whether that was raised with the FTC?

A. I don't know.

Q. Reason to believe it would have been since they raised it at the FCC, right?

A. The FTC doesn't review what parties say to them.

Q. And in the Time Warner -- the FCC --

A. Yes, sir.

Q. in -- Time Warner Adelphia expressly addressed and considered the effects of clustering?

THE COURT: Is that correct?

THE WITNESS: I don't believe that is correct.

Q. Well, let me ask you to look at or maybe I need to hand up to you, the 13th Annual Report of the Federal Communications Commission. If I could have copies, please. It was released January 16, 2009. And this is one of the reports that you reviewed, Dr. Williams and that you cite multiple times in your multiple reports, correct?

A. I believe that's correct.

[Page 29]

MR. SHUSTER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q. Permit me to direct your attention, Dr. Williams, if I may, to page 87, paragraph 180 of Defendant's --

THE COURT: Let me have the page and paragraph again, Counsel?

MR. SHUSTER: It is page 87, your Honor.

THE COURT: Okay.

MR. SHUSTER: Paragraph 180.

THE COURT: Okay.

THE WITNESS: Yes, I'm there.

MR. SHUSTER: I just want to give the Court a moment.

(Pause.)

THE COURT: Okay.

Q. So, Dr. Williams, you see that in paragraph 180, now, this is a report issued -- the annual report issued by the FCC, it's 13th Annual Report issued this year, released this year, right?

A. That's correct.

Q. And you cite this report for several propositions in your reports and tables, including the proposition that clustering leads to higher prices?

A. That's correct.

[Page 30]

Q. And the second sentence, well, the first sentence of paragraph 180 says, "Cable operators continue to pursue a regional strategy of clustering their systems. The affect of clustering was an issue in the Commission's approval of the sale of Adelphia Systems to Comcast and Time Warner, because the transaction resulted in more clustering for Comcast and Time Warner in numerous markets." You see that?

A. I do.

Q. And that transaction was reviewed by the Federal Trade Commission?

A. I believe so.

Q. And you're saying to this Court that the economic evidence is not open to dispute that

clustering leads to higher prices, correct, that's what you said yesterday?

A. Yes, sir.

Q. So, in order for the FTC to have approved the transaction, the Federal Trade Commission and the FCC, they would have had to ignore the overwhelming weight of the evidence, as you call it, that clustering leads to higher prices, correct?

A. I'm not privy to their deliberations.

Q. And one of the things the FTC and the DOJ and the FCC all attempt to address in as rigorous a manner as possible, is whether proposed transactions put forward to them for their review, will result in higher prices to subscribers?

[Page 31]

A. It's consumers, but --

Q. Well, in the cable industry we're talking about subscribers, right?

A. That's correct.

Q. And that's one of the things, if not the predominant issue, that they're attempting to address when they review those transactions, right?

A. That certainly is a key consideration, yes, sir.

Q. Is anything more important to them than whether the deal will result in higher prices to the consumers?

A. Not that I'm aware of.

Q. Do you remember in -- just back on the subject of whether the FTC considered the SportsNet issue -- do you recall reading in Dr. Chipty's class

cert rebuttal report, dated May 6, 2009, a quote from the Director of the Bureau of Economics of the FTC, on that subject?

A. I don't specifically recall it.

MR. SHUSTER: I'm in no hurry, if your Honor is reading. I'm very happy to wait.

THE COURT: Are you finished with 180?

MR. SHUSTER: For the moment, I'll be back to this document.

THE COURT: Are you going to get the 181 or shall I do that? Or do you want Mr. Goldberg to do that?

MR. SHUSTER: No, your Honor.

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MR. GOLDBERG: I'm planning on it, your Honor.

THE COURT: All right. I don't want to interfere with your cross-examination. One lawyer said to me if you're going to ask questions for me, if you're going to take over the trial of the case for me, don't lose it.

MR. SHUSTER: Your Honor, 181 doesn't trouble me, at all. 181, Dr. Williams says that the commission didn't find that --

THE COURT: Let's just stay with the witness, so that we can finish our examination of him.

MR. SHUSTER: Well, that's fine, we'll come back to it.

BY MR. SHUSTER:

Q. One of the observations that's made in paragraph 180, is that clustering can make cable

operators more effective competitors to LECs L-E-Cs -- whose local service areas are usually much larger than a single franchise area, do you see that, Dr. Williams?

A. I do.

Q. What's a LEC?

A. A Local Exchange Company.

THE COURT: I'm sorry, what's that?

THE WITNESS: It's a Local Exchange Company, it's like a local phone company.

Q. Okay, the technical term is Local Exchange Carrier?

[Page 33]

A. No, that's not correct.

Q. Local Exchange Company?

A. You're -- LEC, I'm sorry, Local Exchange Carrier, yes.

Q. Carrier.

THE COURT: And what is a Local Exchange Carrier?

THE WITNESS: It's the local phone company, the incumbent local phone company.

THE COURT: Okay.

Q. And the FCC, in its 2009 report says, "Clustering can make cable operators more effective competitors to LECs, to LECs, whose local service areas are usually much larger than a single franchise area." Do you see that?

A. Yes, I just said I did.

Q. The regional phone companies are clustered, right?

A. It is Local Exchange Company, not Local Exchange Carrier. Clustered? I mean, they're the remnants of the old AT&T systems, so they have broad networks throughout the whole United States.

Q. You mean, they have networks, for example, must larger than say, the Philadelphia DMA?

A. I don't know how to answer that. I mean, Local Exchange Companies are ubiquitous throughout the United States. They provide hard line phone service to most every individual in the United States.

Q. Right and Verizon's one of those companies, correct?

[Page 34]

A. Verizon -- Verizon has both local and long distance operations.

Q. And Verizon has entered the MVPD industry, correct?

A. That's correct.

Q. And Verizon is now competing with Comcast in the Philadelphia DMA?

A. That is correct.

Q. And Verizon is competing with other cable companies, including Comcast, in numerous other DMAs throughout the United States?

A. That is correct.

Q. And it was known and understood that the Local Exchange Carriers or Companies would be

entering the MVPD market as early as the late-1990s, right?

A. It was certainly, that was certainly Congress' hope, yes.

Q. And they made concrete plans to do so in the early 2000s and they're doing so, right?

A. Yes, it has taken, I think, much longer than anyone anticipated though.

Q. And part of that reason is the enormous capital investment they've had to make to upgrade their systems to provide video, right?

A. That's correct and Dr. Singer also points out, in Philadelphia, part of the reason is the efforts of Comcast to delay Verizon's entry.

[Page 35]

Q. Well, that's what Dr. Singer says, but he's not here. So, we'll let him speak for himself. We're all able to read what he said. So, now, you say -- you present tables, you present tables summarizing the evidence that you say overwhelmingly supports your view that clustering leads to higher pricing, right?

A. Yes, sir.

Q. And you've -- those are the tables we went over yesterday and we'll go over them again today?

A. That's fine and I just would point out that there's other evidence in the other reports, as well. But, yes, those tables were an attempt to summarize some of that evidence, yes, sir.

Q. And that same literature that you cite to, the FCC reports, the GAO reports and academic articles all that's available to the DOJ, the FTC and the FCC?

A. Yes, sir.

Q. And those agencies are fully capable of and do block merger transactions when they think they're going to have an adverse affect on competition?

A. I would generally agree with that, yes, sir.

Q. Well, for example, DirectTV and EchoStar, the two direct broadcast satellite providers wanted to merge, right?

A. They did, yes, they filed discovery (indiscernible), yes, sir.

[Page 36]

Q. And they sought to merge, right?

A. Yes, sir.

Q. And the agencies, I don't remember if it was the DOJ or the FTC, I think --

A. The DOJ.

Q. -- it was the DOJ. And the FCC said no.

A. I don't remember, the FCC may well have said that, I remember the DOJ did.

Q. The DOJ said that a merger between DirectTV and EchoStar, in the MVPD industry, would have an adverse affect on subscriber rates, right?

A. That's correct.

Q. And they blocked the deal on that basis?

A. They did.

Q. And they said that in addition to competing with the traditional cable providers, DirectTV and EchoStar also compete with each other, right?

A. I don't remember that. It certainly would not surprise

me.

Q. And it was on that basis, because they compete with each other, that they blocked the transaction, correct?

A. I wouldn't phrase it quite that way. I would say that the DOJ concluded that the merger was going to have anti-competitive effects.

Q. They found that they were overlapping competitors, you **[Page 37]** understand what that term means?

A. Yes, sir.

Q. That finding has never been made as regards to -- in any meaningful way as regards to cable MSOs, for purposes of blocking a transaction, right?

A. I don't know that.

Q. Well, you're not aware of any such finding?

A. I'm not aware of such a finding.

Q. Just going back to that map, for a second, because I want something else to be clear, please. I'm going to come back to this, but your Honor has the map?

THE COURT: Sure.

Q. But even prior to the Adelphia transaction or any of the other deals, Comcast and Lenfest (ph), closed in January of 2000, right?

A. That's correct.

Q. Comcast was a substantial cable cluster, at that time?

A. After the Lenfest acquisition?

Q. Before.

A. Sure, Comcast had substantial properties in the Philadelphia DMA before the Lenfest transaction.

Q. And Lenfest was a substantial cable cluster, at the time, right?

A. Lenfest had, yeah, they have approximately a million customers.

[Page 38]

Q. Over a million, right?

A. I don't remember the exact -- 1.1 million is what my report says.

Q. Okay, and that made Lenfest one of the largest cable clusters, if not the largest, in the United States, at that time?

A. I don't recall that.

Q. But it certainly was one of the largest?

A. I don't have any --

Q. Well, you know that today, there's maybe ten cable clusters of a million or more?

A. I don't specifically recall that, but that may well be right.

Q. It sounds about right?

A. Could be.

Q. So, Lenfest had 1.1 million subscribers that, even just standing alone today, Lenfest would be one of the largest cable clusters today?

A. They certainly are a large cable company, yes, sir.

Q. So, when the agencies and the FCC and the DOJ or FTC were evaluating that transaction, they knew there was major clustering going on there, right?

A. When you said that transaction?

Q. Comcast/Lenfest.

A. And then your question is, at the time of that **[Page 39]** transaction, were the agencies aware of clustering?

Q. That was major clustering going on here in the Philadelphia DMA?

A. I would presume, I don't have specific knowledge that they were aware of that, but I would presume that they were aware of it.

(Pause.)

Q. Now, Dr. Chipty specified, for this case, a regression model to estimate the price effects of clustering, correct?

A. Yes, sir.

Q. And her model also attempts to explain the determinants of expanded basic pricing, right?

A. I'm not -- she has a large, large number of models. I'm not sure specifically which one you're referring to.

Q. Well, large, large number of models, Dr. Williams, when you count up Dr. Chipty's models, if

she presents an exhibit in one of her reports, like Chipty Exhibit 25 and her merits report. And she reflects the results of her regression there and she has six different columns where she builds in additional independent variables, you and plaintiffs are calling each of those columns a separate model, right? That's how you get your 51 model count?

A. I didn't count the models myself. But it generally would, the term for different regressions with different sets of independent variables, would be a different regression **[Page 40]** log.

Q. So, you're saying that every time, using the same model, additional variables are added in as reflected in additional columns, that's a whole new model?

A. That would be, that's the normal way you use the word model in a regression context. But there's no reason to debate the semantics. I mean, she has as many regressions as she has.

Q. Well, I just -- when you say she's got lots and lots of models, it sounds and plaintiffs say 51 models, I mean, what Dr. Chipty did is she specified two basic models here, to start with, right? One to estimate the price affects of clustering and one to estimate the affects of clustering on over-building, right? She started there basically?

A. I'm not sure that's right, but I'll accept your representation. I just know that there is -- if you want to say a large number of regressions, instead of a large number of models, it doesn't change the facts.

Q. Well, you read all her reports?

A. Certainly.

Q. I'm now asking you -- forget about quantifying the columns, you understand that essentially, what she started out to do, in this case, was to specify a regression model to estimate the price effects of clustering, right?

A. That's one of the things she looked at.

[Page 41]

Q. And then to specify a regression model to estimate the effects of clustering on over-building, right?

A. That's one of the things she looked at.

Q. Okay. And then, those were her two major regression models that she started out with, right?

A. That may well be, that may well be the case.

Q. And then, in response to criticisms from you, from Dr. Singer and from Dr. McClave, she re-ran her models trying to address the criticisms that you all interposed, do you remember that?

A. I -- that certainly explains some of the regressions that she ran, yes.

Q. Right. Now, apart from Dr. Chipty, tell me of anyone you know of, who has specifically -- who has specified a regression model to estimate the price effects of clustering since 2001?

A. Since 2001?

Q. Since 2001.

A. Obviously, to give a complete -- I'd have to review all my reports. So, I'm not sure I can give a definitive answer to that question right now.

Q. Well, off the top of your head, you can't think of one?

A. Well --

Q. Before you start reviewing documents, Dr. Williams, which could take a while.

[Page 42]

A. Yes.

Q. Off the top of your head, can you think of one?

A. I believe, I'm pretty sure I've seen academic studies since then. As I said, I'd have to review all my reports and all of my -- the literature I've looked at. I'm not certain.

THE COURT: Off the top his head, he can't point out what? He'd have to look at this.

MR. SHUSTER: Well, we're going to look at his tables and we'll look at the economic evidence that you put forward in support of the proposition that clustering is correlated with higher prices, we're going to get there, Dr. Williams, so, don't get ahead of me or you'll miss the questions. And when we do that, you'll have a chance to tell us if you've identified any other since 2001 and Dr. Chipty's original empirical research here for this case, okay?

THE WITNESS: Okay.

Q. You certainly did not specify a regression model here to estimate the price effects, if any, of clustering?

A. That's correct.

Q. What you did do is you took her model and you re-ran it, making and adjustment to the independent variable for cluster size, right?

A. Yes, that's certainly one of the many things I did.

Q. Okay. Now, you take issue with Dr. Chipty for including in her data set, by the way, I don't have any need of these **[Page 43]** maps. I'd rather use the other ones. You take issue with Dr. Chipty for including in her data small sized clusters, right?

A. Yes, sir.

Q. You say they're not clusters, at all, right?

A. Well, what I said was the FCC and Kagan would not regard them as clusters.

Q. Okay, I'm asking you now, are small sized clusters, clusters?

A. No. Well, I'm sorry, just to be clear, when you talk about small sized clusters, are you going all the way down to 27 --

Q. I'm going down below 100,000.

A. Well, certainly, below 100,000, again, I'm relying on what the FCC and Kagan have defined.

Q. Are there clusters of cable systems smaller than 100,000?

A. Not the way the FCC and Kagan define it.

Q. Earlier today -- earlier today, I asked you, aren't there cable clusters that, you know, that there are about 80 to 90, that are 100,000 or more and there are many that are below 100,000 and you answered yes, do you remember that?

A. Yes, I recall it.

Q. You, sitting here today, are you saying that any cable cluster that has fewer than 100,000 subscribers in it, is not properly characterized as a cluster, at all?

[Page 44]

A. I don't have a specific opinion on that. What – my feeling was in the context of the regression, that I would have relied on the FCC --

Q. Well, I'm asking for your specific opinion on that.

A. I have not offered in any of my reports, a specific opinion on what the absolute right definition of a cluster is.

Q. Okay, so, you don't have a definitive view on whether cable systems that have a number of subscribers smaller than 100,000, can properly be called cable clusters. But it's your decided view they shouldn't have been included in Dr. Chipty's regression?

A. Right, because of the FCC and Kagan's definitions, yes, sir.

Q. Now, this is the first time, this case is the first time you're analyzing clustering issues in the cable industry?

A. That's fair.

Q. But you know that it's not Dr. Chipty's first time analyzing clustering and other issues in the cable industry, right?

A. Dr. Chipty has published a couple of papers on the cable industry.

Q. She has published three widely cited papers in peer review journals, isn't that correct?

A. I believe she's published more than three papers in peer **[Page 45]** review journals.

Q. I'm talking about on the subject of, specifically, she's published three widely cited papers in cable. You're quite right, she's published many, many more papers on many other subjects.

A. I believe that's correct.

Q. Right. She's a recognized expert in antitrust economics pertaining to cable, right?

A. I don't have an opinion on that. I don't know --

Q. You don't --

A. -- I don't what recognized expert --

Q. I mean that other experts, in the field, rely upon and cite to her work?

A. They certainly have cited her work, yes, sir.

Q. But they haven't cited to any work you've done in the field?

A. The field being?

Q. Cable.

A. I don't believe so.

Q. You haven't been cited by the FCC in any of their reports?

A. Not on the subject of cable television. I have been cited by the FCC on other subjects.

Q. But you haven't been cited by the FCC in any of the reports that we've been looking at in this case and that **[Page 46]** you're relying upon, their annual reports on the cable television industry and cable prices and the various transactions, correct?

A. I believe that's correct.

Q. You haven't been cited in the GAO reports on the those subjects?

A. I believe that's correct.

Q. You haven't been asked to comment by either the FCC or the GAO on those issues?

A. Well, those issues is pretty vague.

Q. Clustering, cable pricing, MVPD pricing, vertical foreclosure of regional sports networks.

A. I have not.

Q. Dr. Chipty has, right?

A. I don't know that.

Q. Let me show you what we've marked for identification as Defendant's 70. We're getting hard copies, but meanwhile, I think it's on your screen. Your Honor, do you have one on your Honor's screen?

THE COURT: I do.

MR. SHUSTER: Can I work from the screen?

THE COURT: Absolutely.

MR. SHUSTER: Until we have the hard copies, to save time. Okay, so, incidentally, I don't think I moved Defendant's 37, was it, into evidence, the FCC report.

[Page 47]

THE COURT: D-37 is received in evidence.

(Defense Exhibit 37 received in evidence.)

MR. SHUSTER: Thank you, your Honor.

THE COURT: Do you want the entire exhibit, you referred to page 87, paragraph 180. Do you want all of D-37 in?

MR. SHUSTER: I do.

THE COURT: Very well, it's admitted, all of it.

MR. SHUSTER: Thank you.

(Exhibit D-37 admitted into evidence.)

Q. So, Dr. Williams, what Defendant's 70 is, is a table we've compiled reflecting citations to Dr. Chipty in sources relied upon by the plaintiff's experts here. And I believe, sir, if you'll just look on page one, all of those FCC reports are reports that you, yourself, are relying upon, right?

A. I believe that's correct.

Q. And then, if you look at the right-hand column, you can see, so, in the 1999 report, they cite T. Chipty, that's Tasneem Chipty, horizontal integration for bargaining power, evidence from the cable television industry, right?

A. I see that.

Q. So, that's one of the subjects you're opining on here in this courtroom, horizontal integration of cable companies for bargaining power with programmers, right?

[Page 48]

A. That's correct.

Q. And she wrote an article on it ten years ago?

A. She did.

Q. That was cited by the FCC?

A. That's correct.

Q. Let's turn to the next one, 2000 FCC report on cable industry prices. You see that Dr. Chipty is cited there again?

A. I see that.

MR. SHUSTER: Just give me a minute, if you would.

(Pause.)

Q. In fact, I'm going to, before I get ahead of myself, with respect to the first item there, the 1999 FCC report on cable industry prices, I'd like to show you a copy of that for a moment.

(Discussion off the record.)

MR. SHUSTER: Your Honor, may I approach?

THE COURT: You may.

MR. SHUSTER: Thank you.

Q. So, Defendant's 44, Dr. Williams, is one of the reports we've established that you rely upon, correct?

A. That's correct.

Q. Let me direct your attention, I just want to show you one thing in this, to page 36. Well, I'll show you 35, too, but let's start on 36. Page 36, if you could direct your **[Page 49]** attention, please, Dr. Williams, to the bottom paragraph that starts, "the estimated co-efficients"?

A. Yes, I see that.

Q. And then, if you would be kind enough to look six lines down to the sentence, "believing the demographic variables"? Are you with me, it's the

sixth line down in the paragraph. Sentence starting, "flush left, the demographic variables."

A. I see that.

MR. SHUSTER: Is your Honor with me?

THE COURT: I am.

MR. SHUSTER: Thank you.

Q. So, it says, "the demographic variables include log of population density." You see that?

A. I do.

Q. And a log of various other things?

A. Yes, sir.

Q. Other demographic measures?

A. That's correct.

Q. And we've talked a lot about population density already in this hearing, right?

A. With Dr. McClave, that's correct.

Q. Right. So, the FCC is referring to its use of population density in one of its studies, right?

A. That's correct.

Q. And it is, if you go to the end of that sentence, there's **[Page 50]** a footnote, Footnote 57, it's citing to Dr. Chipty for support for that -- for the appropriateness of doing that, right?

A. It, being inclusion of some of these variables, is that the it?

Q. Yes, yes.

A. Yes, I believe that's correct.

Q. Including the "it" being specifically population density?

A. I believe that's correct.

Q. Okay, thank you. Now, the next report is the 2000 FCC report. And by the way, you rely upon this, what I just showed you, Defendant's -- I'm hopeless.

THE COURT: 44.

Q. Defendant's 44 as support for your, specifically for your pricing. Your argument that clustering is correlated with higher pricing, right?

A. That may well be the case.

Q. Okay.

A. I'd have to check my reports.

Q. We'll come back to it, we'll come back to it. Let's now look just at the next item. So, that is the 2000 FCC report. You see they're citing to the same article of Dr. Chipty?

A. I see that.

Q. And then the 7th Annual Report cites to the same article and the 2001 report cites to the same article.

[Page 51]

A. Yes, sir.

Q. And then the 2000 report cites to a new article?

A. The 2000 report, you lost me, where are you?

Q. Sorry, the 2000, sorry. I can understand what I did. The last report on that first page --

A. Yes, sir.

Q. -- of Defendant's 70?

A. Yes, I see that.

Q. It cites now, so it cited to her horizontal integration, that article and now it's citing to her -- a new article on vertical integration?

A. That is --

Q. Market foreclosure and consumer welfare in the cable television industry, right?

A. That's correct, yes, sir.

Q. And those, incidentally, the Journal of the American Economic Review is a peer review journal, right?

A. Yes, it is.

Q. As is the Journal of Economics and Management Strategy?

A. Yes, it is.

Q. So, let's turn, if we could, please, to Defendant's 70.

A. I thought that's what we were looking at?

Q. Yeah, the next page, I apologize, forgive me. The second page of Defendant's 70.

A. Yes, I'm there.

[Page 52]

Q. Now we see that a 2003 GAO report cites to Dr. Chipty's vertical integration article?

A. Yes, sir.

Q. And then the 2006 FCC report on cable industry prices cites to that same article?

A. Yes, sir.

Q. The most recent report, FCC report on cable industry prices, cites to that same article?

A. Yes, sir.

Q. And then several academics cite to Dr. Chipty's articles. These are all academics whose articles you rely upon and identify in your tables?

A. I believe that's correct.

Q. And now, in addition to Dr. Chipty's horizontal and vertical integration, articles that are citing to a new one from 1999, if you see Brown and Clemens, the role of firm size in bilateral bargaining. A study of the cable television industry?

A. Yes.

Q. Do you see that?

A. I do.

Q. And if you turn to the next page, the Wise and Duwaddy (ph) at the very bottom?

A. Yes.

Q. You'll see that they cite to Dr. Chipty's '94-'95 and **[Page 53]** 2001 studies as important studies of the cable industry, right?

A. Yes, I see that.

Q. And you remember seeing that reference when you reviewed the Wise and Duwaddy article for purposes of putting together your opinions?

A. I don't specifically remember seeing the cite to Dr. Chipty, but obviously, it's there.

Q. Now, coming back to the issue of cluster size, Dr. Williams?

A. Yes, sir.

Q. Let's turn to -- I'm going to show you the FCC's report on cable industry prices, released February 14, 2001.

MR. SHUSTER: May I approach, your Honor?

THE COURT: Yes.

MR. SHUSTER: Thank you.

Q. Let me direct your attention in Defendant's 43, Dr. Williams, to page 15.

A. Yes, I'm there.

Q. There's a heading on page 15, there's a heading on page 15 called clustering, do you see that?

A. Yes, I do.

Q. And it says there, "We sought to gather information on and analyze the effects of clustering. For the past several years, cable operators have engaged in a strategy of buying **[Page 54]** and/or swapping cable systems of various sizes, with the objective of creating clusters of contiguous, commonly owned and operated cable systems." And you see the next sentence says, "Some of these clusters may consist of large regional groupings, involving a million or more subscribers, while others may be made up of a handful of small operators serving a few thousand or fewer subscribers." Do you see that?

A. I do.

Q. So, in a report that you're relying upon, the FCC makes explicit that they regard clusters of a few thousand or less, you know, groupings of cable

systems that serve a few thousand or fewer subscribers to be clusters, right?

A. That's correct.

Q. And then in the next paragraph, in the first sentence, they say, "Analysts report that since '99 MSOs sought to create larger clusters to better enable cable operators to provide local telephone and internet services." You see that?

A. I do.

Q. And that is consistent, of course, with Mr. Burke's testimony of yesterday, right?

A. I believe so, yes, sir.

Q. Let me direct your attention to the next page. Paragraph 43. Now, you rely on this for your -- in your tables and I'm going to come to -- I'm going to come to the beginning of the **[Page 55]** paragraph, soon enough. But let me direct your attention to the last sentence. The one that begins, "you criticized Dr. Chipty for applying an algorithm to identify clusters that results in the inclusion of un-integrated cable systems in her cluster price regression," right?

A. I don't think I used the phrase un-integrated.

Q. Non-integrated systems, systems that haven't been integrated, you don't recall making that criticism of her?

A. I don't specifically remember using the word, integrated.

Q. But your criticism is that she is, at times, her algorithm pulls in cable systems that aren't necessarily integrated. I thought that was a criticism.

A. Well, perhaps I'm not -- I'm not sure what you mean by integrated.

Q. Okay, well, in any event, the FCC says that their regression equation does not take into account the difference between integrated and non-integrated systems, cost factors or the timing of consolidation, because that information wasn't available to them. Do you see that?

A. I do.

Q. Okay. Now, they refer to a price regression they ran in here. Are you aware of any regression that the FCC has reported, any regression model they specified and reported on the any connection between clustering and cable prices since this report?

[Page 56]

A. An FCC regression?

Q. Yeah.

A. May I have a moment to check?

Q. You want to check your tables?

A. I would like to, but if you don't want me to, I won't.

Q. We will, I'm going to come to your table in a minute. You don't recall off the top of your head, whether there is any subsequent FCC regressions?

A. This is the -- well, my table lists -- I'd have to double check more, but I'm just --

Q. Okay.

A. -- my table, right now, lists an FCC 2002 report that finds that -- and FCC 2009, not a regression in 2009, but a discussion of that.

Q. Right, not a regression.

A. Yes, sir.

Q. Okay, now, you stated yesterday that Dr. Chipty was applying an algorithm of her own invention in her clustering analysis, do you remember using those words?

A. Not specifically, but I don't -- you may well -- you're probably right.

Q. And the algorithm that you described as an algorithm of her own invention, is an algorithm in her 1995 article, the one that's repeatedly cited by the FCC and the GAO, right? A. That's correct.

[Page 57]

Q. And other academics?

A. That's correct.

Q. So, when you mentioned that it was algorithm of her own invention, you weren't intended to suggest she invented it for this case, were you?

A. No, no, she invented it a long time ago.

Q. Right and she applied that algorithm in the regression model that she specified here, right?

A. That's correct.

Q. And in doing that, she was being consistent with her work since 1995?

A. Yeah, I'm not sure what the word since means, but it was consistent with her work in 1995.

Q. And her algorithm provides an empirical basis for identifying a cluster, correct?

A. It, yes, it provides -- that's true, yes.

Q. And she has developed a mathematical equation that she uses to identify clusters, isn't that what an algorithm is?

A. It's not actually an equation, but -- and I think I know what you mean.

Q. It's an algorithm?

A. It's an algorithm.

Q. Okay. We don't have to argue about whether it's an equation. Now, you mentioned that Kagan and I will come to Kagan, identifies 87 clusters of 100,000 or more, right?

[Page 58]

A. I don't specifically remember saying that, but that may well --

Q. Somewhere in that range?

A. -- that may well be the case, yes, sir.

Q. And her -- the application of her algorithm, using that empirical basis, leads to identification of 90 clusters of 100,000 or more?

A. That may well be the case, yes, sir.

Q. But she gets there not by relying Kagan or anybody else, but by applying this empirical basis that she developed several years ago for identifying clusters?

A. That's correct.

Q. You have not developed any empirical study or algorithm or basis for identifying clusters?

A. That's correct.

Q. You rely, in part, on Kagan?

A. In part, yes, sir.

Q. Kagan is -- they're not antitrust economists?

A. Not that I'm aware of.

Q. She used her algorithm for purposes of specifying the clustering variable in her regression?

A. Mostly. She made certain ad hoc adjustments to it.

Q. That was one of the independent variables in her model?

A. The results of her algorithm?

Q. Yes.

[Page 59]

A. Yes, sir.

Q. And she specified other independent variables, right?

A. Yes, sir.

Q. You took her model, you adjusted, basically, that one variable and then re-ran it?

A. The one variable being cluster size, yes, sir.

Q. Right, okay. She had approximately 1,000 observations?

A. I believe it was 1,000 -- no, that's not right. She had, I think, 1,008 clusters, but she had way more observations than that.

Q. Okay, so, she had 1,008 clusters. And you said, well, Kagan says a cluster is 100,000 or bigger and on that basis, you dispensed with half of the clusters in her data set?

A. That's not quite right, but I certainly did remove the smaller clusters, yes, sir.

Q. Which was half of the clusters in her data set, right?

A. I don't recall the exact proportion.

Q. You did not run or report the results of running her model, starting with, say, a cluster size of 200,000, right?

A. 200,000 subscribers or homes --

Q. Yes, subscribers.

A. I did not report that, that's correct.

Q. Okay. And where you start, you know that where you start could affect the results?

A. Can affect it, yes, sir.

[Page 60]

Q. Right? She responded to you and said if you would like to start at a different place and not use all the data, why don't we start with where Comcast was in the Philadelphia cluster, before the transactions, right?

A. That's one of the things she did, yes, sir.

Q. When Comcast had 400,000 subscribers and 900,000 homes passed?

A. That's one of the regressions she ran, yes, sir.

Q. And when she did that she found, when she ran that regression she found no correlation between, no statistically significant correlation between cluster size and pricing, right?

A. I believe that's correct, yes.

Q. And so coming back to, and we're going to come to your table in a second, but coming back to where we started, what we had in the Philadelphia area, the beginning of the class period, we had Comcast being a cluster of 400,000 subscribers, 900,000 homes passed?

A. I believe so.

Q. And Lenfest being over a million?

A. A million subscribers, yes, sir.

Q. Right. Have you ever, did you ever develop any empirical basis, an empirical model to study the effect on prices when you combine a cluster of 400,000 with a cluster of 1.1 million?

[Page 61]

A. I did not.

Q. Have you seen anybody else that's done that?

A. That specific calculation?

Q. Yes.

A. I don't recall that.

Q. Could have done that here, could you have specified that model here, tried to develop a model that shows what happened when you combine a cluster of roughly a magnitude of 400,000 subscribers with one of 1,100,000?

A. I'm not -- I haven't done that study, that very small sample size.

Q. Okay. Now let's look at your table which is Plaintiff's Exhibit 53.

A. I'm sorry, which table are we looking at?

Q. It's your -- it's your table, this document, the Plaintiff's 53, the one where you summarized --

(Discussion off the record.)

BY MR. SHUSTER:

Q. All right, thanks, Daniel.

COUNSEL: Mike, is this what you're using?

MR. SHUSTER: It's the one table for economic evidence on the issues raised.

COUNSEL: Thank you.

THE COURT: Where is that table? In the doctor's report?

[Page 62]

THE WITNESS: It's Page 22 of my September 11th

report.

THE COURT: Thank you.

(Discussion off the record.)

MR. SHUSTER: These were the tables that were reviewed with Dr. Williams in his direct testimony yesterday.

THE COURT: Okay. I have your supplemental report,

Doctor, where is it in there?

THE WITNESS: Page 22.

THE COURT: Page 22, thank you.

I have it, Counselor.

MR. SHUSTER: Thank you, your Honor.

BY MR. SHUSTER:

Q. Dr. Williams, do you?

A. I do.

Q. And this is a table you're putting forward to cite the supporting economic evidence in support of your opinion that there is a basis for the Court to make a finding that common evidence is available to the class to show economic impact from clustering?

A. That's -- the specific purpose of the table was to evaluate the question posed in the first column.

Q. But you're tendering it to the Court as a basis -- you're saying this is economic evidence that the Court can rely upon to make a finding that common evidence is available to the **[Page 63]** class to establish antitrust impact, right?

A. That's correct, yes, sir.

Q. Okay. So you posed the question on the left. Now you put the -- you have a column on the right, Drs. Teece and Chipty's position. You mention the Teece declaration, Dr. Chipty's regressions, you don't include any of the documents where the FCC reflects its approval of the transactions that are addressed that were used to comprise the cluster?

A. That's correct, these are all --

Q. I mean you don't for example --

A. These are all econometric studies but --

Q. Well, you don't include the FCC's order on the Adelphia

Time Warner transaction, for example, where it expressly said that -- where it addressed the effects of clustering as we saw earlier?

A. That is not listed in this table.

Q. None of the deal approval, no order by the FCC approving any of the transactions is listed in the table?

A. That's correct.

Q. Now you say that when a cable, do a cable system's rates increase when it becomes part of a cluster or becomes owned by a large MSO?

A. Yes, sir.

Q. All right. And then you identify evidence for both of those propositions.

[Page 64]

A. Yes, sir.

Q. You realize the issue of whether cable systems became part of a large MSO was not an issue before the Court under Section 1 or Section 2?

A. I'm sorry, I don't understand the question.

Q. You're not suggesting that just because a cluster is owned by a large MSO that affords a basis for a finding of antitrust impact?

A. I'm still not sure I understand the question. What I'm familiar with is the plaintiffs' allegations which relate to the nine swaps and acquisitions and the denial of access to Sportsnet.

Q. And their allegations go to clustering, not MSO size, right?

A. Well, they go to the effect of the swaps and the acquisitions in creating the Comcast cluster, yes, sir.

Q. So out of the one, two, three, four, five, six, seven, eight, nine, ten, 11, 12, 13, 14, 15 citations that you provide here, by my count at least 11 relate to the MSO size issue, is that right?

A. That might be correct. Of course there's, as we saw in the document you pointed to earlier, there's of course no dispute that there's an intimate connection between MSO's and cluster size.

Q. But these studies, and this is why I asked that question **[Page 65]** before, the FCC reports and the studies that you put forward that address a cable system becoming part of a larger MSO, those reports do not specify regression studying, reporting or studying the effects of clustering on prices, right?

A. That -- there are -- they, some of the studies specify relationships between large MSO's, some specify between clusters. There's, as I said, a very intimate, a very close connection between the two.

Q. Well, you identify which do which and I'm saying 11 of them go to the MSO size issue.

A. There's -- I don't have a specific count. There certainly are lots of right-hand side variables that go to this general issue in all these regressions.

Q. The FCC 1999 and 2000 reports, the FCC '99 report, that refers to an MSO, large MSO issue.

A. Yes, I believe that's correct.

Q. And so does the next one?

A. The FCC 2000 report?

Q. Yes.

A. Uhm, no.

Q. It says the MSO has higher rates, right?

A. Yes, that's correct.

Q. And then the next one goes to the clustering issue?

A. That's correct.

Q. And the next one goes to MSO size?

[Page 66]

A. That's correct.

Q. The next one goes to clustering, then the next one goes

to MSO's, right?

A. That's correct.

Q. Now and then on the next page four out of the five go to MSO size, right?

A. That's correct.

Q. And then on the next page they all go to MSO size except the Direct TV one?

A. That's correct.

Q. And all of the -- all of the cable, major cable providers that were in the Philadelphia cluster prior to the transaction were top ten MSO's, right?

A. You'd have to tell me which ones you're referring to specifically.

Q. Comcast, Lenfest, Time Warner, Adelphia, AT&T Broadband.

A. I don't believe Lenfest in an FCC report is -- I would have to double check this but I don't believe in an FCC report Lenfest is listed as a top ten.

Q. But they're close, right?

A. The table just lists the top ten, it doesn't list Lenfest. I mean I looked at every FCC annual report and checked very carefully whether Lenfest ever appeared as one of the top ten in --

Q. And in any event Lenfest was owned by AT&T Broadband, **[Page 67]** right?

A. I believe they were half owned by AT&T Broadband.

Q. Okay. And AT&T Broadband was at the time the largest cable company in the country, right?

A. That may well be true.

Q. You don't know?

A. I don't specifically recall that. When you say at the time you mean circa 2000?

Q. Yes.

A. I don't remember who was the -- I think it was.

Actually, I think it was AT&T.

Q. So if that's true then for that purpose the fact that these cable companies changed hands, they went from one top ten MSO to another, right?

A. Well, again, the question is very vague. I'm not sure which cable companies you're talking about.

Q. Time Warner, the subscribers of Time Warner, Adelphia, Lenfest --

A. Not Lenfest.

Q. AT&T Broadband. But Lenfest was owned by AT&T Broadband, right?

A. No, they were partially owned by AT&T.

Q. Okay. So they were partially owned, they were 50 percent owned by the largest cable company in the country and then they became owned by a smaller cable company at that time, **[Page 68]** Comcast, right?

A. They -- that's correct, they were partially owned by AT&T.

Q. Right. And Time Warner, the Time Warner subs in going to Comcast and Adelphia subs in going to Comcast, they -- they were, they went from one top ten MSO to another?

A. I believe that's correct.

MR. SHUSTER: Your Honor, does your Honor want to take a break or --

THE COURT: If you need one.

MR. SHUSTER: No, I don't need one, I don't. I just--

THE COURT: Let's keep going.

MR. SHUSTER: Okay.

BY MR. SHUSTER:

Q. Let me show you --

MR. SHUSTER: May I approach, your Honor?

THE COURT: Yes.

BY MR. SHUSTER:

Q. -- Dr. Williams what's been marked for identification as Defendant's 63. (Pause.)

Q. And you'll see that that's a listing of cable's top 50 MSO's, dated December 13, '99.

A. I see that.

[Page 69]

Q. And you'll see that No. 10 on that list is Lenfest.

A. I see that which is-- I do see that, yes, sir.

Q. Okay. You have no basis to dispute the factual accuracy of this document?

A. Not of this document. As I said, it conflicts with the FCC reports.

Q. In the -- so now in the, I asked you before if you're aware of any regression model that was specifically specified to find, to correlate, to find if there's a correlation between cable prices and cluster, right, earlier?

A. I recall --

Q. Since 2001.

A. Yes, I recall your question.

Q. And now you have your table there. Do you see any other models identi-- any other sources here that -- that do that, that specifically that specify a regression model for that purpose, to estimate the price effect of clustering?

A. Well, my answer is this, yes.

Q. Which, the MSO ones?

A. Yes, the MSO ones, as we've discussed. There's, so far as I know there's no dispute that large MSO's are heavily clustered.

Q. So you get there by saying that there are models that attempt to address the relation, whether there's a correlation between large MSO's and pricing, right, and then **[Page 70]** you move from

that to therefore, therefore there's a relationship between clustering and price, yes or no?

A. Yes.

Q. But you're not saying that those models, Dr. Williams, the ones that are specified to estimate what the price effects of MSO size, you're not saying that those models specifically include as an independent variable cluster size?

A. They do through the effect of the MSO variables.

Q. So you're saying that only through the effect of the MSO

variables do they address cluster size?

A. That's my recollection, yes, sir.

Q. Other than that are you aware of any regression model since 2001 that specifically attempts to estimate the effects of clustering on pricing, other than the models that estimate the relationship between MSO size and pricing?

A. I am not aware of any.

Q. In the FCC's models from 2000 and 2001 they include small

cable clusters, don't they?

A. I believe that's correct.

Q. And don't they include cable clusters, they have them as dummy variables, right, as indicator variables?

A. I believe that's correct.

Q. So they assign here either a zero or a one to whether a system is clustered or not clustered?

A. That's correct.

[Page 71]

Q. So they don't study the relationship between cluster size and prices. Either you're a cluster and the model addresses that or you're not, right?

A. In those first few FCC regressions, that's correct.

Q. The ones that you cite here on Page 22?

A. I believe that's correct.

MR. SHUSTER: I think this would be a good place, your Honor. What time are we going to break for lunch?

THE COURT: I thought we'd go to quarter of 1:00 and then break for lunch until 10 of 2:00, okay?

MR. SHUSTER: Sure.

THE COURT: We'll take a ten-minute recess.

MR. SHUSTER: Thank you, your Honor.

(Court in recess; 12:02 to 12:13 o'clock p.m.)

THE COURT: Mr. Shuster, do you have any notion about how much longer you'll be? I'm not rushing you, I'm just asking you for my own planning purposes.

MR. SHUSTER: You know, realistically I'm going to be a while. I have to cover -- there's a lot of territory this witness covers.

THE COURT: That's all right, okay.

MR. SHUSTER: I think I'm going to, you know what, I don't mean to disappoint Dr. Chipty, I'm not

sure we're going to get this witness off the stand today.

THE COURT: Okay.

[Page 72]

MR. SHUSTER: Your Honor --

THE COURT: I hope you mean that you expect to finish this witness today but not get to another witness today.

MR. SHUSTER: I'm hoping. I'm making a concerted effort. I just would like to move in, your Honor, Defendant's 70, 44, 43, 52 and 63.

THE COURT: They're admitted.

(Defendant's Exhibits 70, 44, 43, 52 and 63 received

in evidence.)

THE COURT: But I have 70, I have 44, I have 43, and

the other one was 63?

MR. GOLDBERG: The new ones.

THE COURT: Thank you. I have no 63.

MR. GOLDBERG: 63, your Honor, is the new one.

THE COURT: Sure, okay, thank you.

MR. GOLDBERG: Could you read those numbers again because I thought I was missing one.

THE COURT: 70, 44, 43 and 63.

MR. GOLDBERG: Okay, great, I have all of those. Thank you, your Honor.

BY MR. SHUSTER:

Q. I just have to go back to your table for a second, Dr. Williams, the one we were looking at a moment ago, Plaintiffs' 75.

[Page 73]

A. That's Table 4?

Q. Yes, it's Table 4.

A. Thank you.

Q. The second page please, Page 23. At the top of the page the top item you say "The Commission has found that clustering can lead to higher cable rates," you see that?

A. Yes, I see that.

Q. Find me language in that report where the Commission says that clustering can lead to higher cable rates?

A. Yes, you're -- what it specifically says is that they're not leading to lower rates.

Q. Okay. So when you said the Commission has found that clustering can lead to higher cable rates what you meant to say is the Commission has found or has not found actually that clustering is leading to lower cable rates?

A. It -- that's what the sentence says, yes, sir.

Q. But when you say that, I'm sorry, I just want to clarify. What you're saying is that the first sentence is not really accurate, it's the quoted language you're relying upon?

A. That's correct.

Q. Now you say that you perform an HHI analysis, right? An HHI analysis?

A. Yes, a structural analysis, yes, sir.

Q. Structural analysis.

MR. SHUSTER: Can you bring the map up, please, **[Page 74]** again? And the one that I'd like, I think it's Exhibit 2 which has the county names on it.

(Discussion off the record.)

BY MR. SHUSTER:

Q. Chipty Exhibit 2. So you say that you performed an HHI. Now you realize that the FCC, and we're going to look at this in the context of the map, but you realize the FCC said in the Adelphia Time Warner order we looked at again, we looked at earlier that -- that it's not appropriate to use HHI analysis, right, in this industry?

A. No, that's not what the FCC said.

Q. Let's turn to the same report we looked at earlier, the memorandum opinion and order, July '06.

MR. SHUSTER: What's the exhibit number?

(Discussion off the record.)

MR. SHUSTER: We don't have it in? We used it. May I approach, your Honor?

THE COURT: Exhibit number?

MR. SHUSTER: It's D-27.

THE COURT: What is it?

MR. SHUSTER: D-27. Memorandum, opinion and order.

THE COURT: July 21st, 2006.

MR. SHUSTER: Right.

THE COURT: D-27's admitted.

(Defendant's Exhibit 27 received in evidence.)

[Page 75]

BY MR. SHUSTER:

Q. Let me direct your attention --

MR. SHUSTER: Thank you, your Honor.

BY MR. SHUSTER:

Q. Let me direct your attention, Dr. Williams, if I may, please, to Page 40, Paragraph 81.

A. I'm there.

Q. The FCC says there "Accordingly we find the HHI calculations presented by commentors do not provide a feasible means of evaluating the competitive effects of the proposed transactions on the retail distribution market," do you see that?

A. I do.

Q. And they're talking about the proposed transaction again is the -- is the Adelphia Time Warner Comcast transaction, right?

A. That's correct.

Q. The one where we saw the FCC explicitly considered the effects of clustering, right?

A. I, yeah, I think you're referring to -- I've forgotten the paragraph number but, yeah, they mention clustering.

Q. So here they're saying, to continue, "By treating cable operators that serve different geographically distinct sets of subscribers as direct

competitors commentors have calculated HHI's for markets in which firms are not directly **[Page 76]** competing with each other for customers." Do you see that?

A. I do.

Q. And they go on to say "We find the relevant geographic unit for the analysis and competition in the retail distribution market is the household. Since the applicants generally operate in non-overlapping territories and do not compete with each other in the distribution markets they serve, the proposed transactions would not reduce the number of competitive alternatives available to the vast majority of households." Do you see that?

A. I do.

Q. "The transactions therefore would not increase market concentration in the relevant geographic market for the retail distribution of cable services. Economic theory indicates that an acquiring firm will not be better able to raise prices if, as is the case here, consumers did not pre-transaction have a greater ability to choose an alternative supplier than they would post transaction. Thus the mere calculation of HHI's for a perceived market is insufficient to demonstrate harm resulting form a horizontal merger." Do you see that?

A. I do.

Q. Now let's just come back to something the FCC said in this Paragraph 81 which is "Since the applicants generally operate in non-overlapping territories and do not compete **[Page 77]** with each other in the distribution markets they serve the proposed transactions would not reduce the number

of competitive alternatives available to the vast majority of households." Do you see that?

A. I do.

Q. You agree with that statement?

A. No, I do not agree.

Q. You said yesterday that -- I thought you said yesterday that if you just look at the household or if you just look at the franchise it's probable you won't find any competitive effect because the cable operator that was serving that household or the franchise area had a hundred percent of the market and all that happens in a transaction is the name on the bill changes." Didn't you say that yesterday for why you have to look to a wider geographic market?

A. That's -- you're in the ballpark but what I said was that from a purely structural perspective if the only thing you ask is whether or not there was a change in horizontal concentration, you're looking at one house at a time, it would be unlikely that there would be a change in market concentration one household at a time.

Q. Right. And what the FCC says is true is that the transactions would not reduce the number of competitive alternatives available to individual subscribers, right?

A. Yeah, one household at a time it's unlikely that, unless **[Page 78]** there was an overbuilt area.

Q. Well, okay, unless there was an -- but that aside.

A. Yes.

Q. Or even one franchise area at a time there might not be a change, right?

A. Absolutely and I talked about --

Q. And that might even be true one county area at a time?

A. If there was only one cable company in that county that would be true.

Q. Okay. Now let's look at the map.

MR. SHUSTER: Roll it up, please, the clustered area.

Your Honor, may I walk over to the screen?

THE COURT: You may.

MR. SHUSTER: Thank you.

BY MR. SHUSTER:

Q. So here we have entire counties that are served by pre, this is all pre transactions, right?

A. Well, the different colors show the different cable operators.

Q. Right. So the light blue is Comcast and the darker blue is, no, the light blue is Comcast, darker blue Lenfest, still darker blue is Adelphia and then let's just focus now on Comcast and Lenfest, okay? So even under plaintiffs' theory, and I'm going to come to it, that RCN applied for open video **[Page 79]** system permission in five counties and therefore would have entered five counties, those counties are Bucks, Montgomery, Chester, Delaware and Philadelphia, right?

A. I believe that's correct.

Q. Okay. So even under plaintiffs' own argument, RCN would only have come into those five counties?

A. Well, those are the five counties that Dr. McClave used in his damage study.

Q. Okay. And we know RCN actually entered Folcroft which is in Bucks?

COUNSEL: Delaware.

BY MR. SHUSTER:

Q. Delaware, sorry, which is in Delaware, so it's one of the five.

A. Yes, sir.

Q. That leaves 11 counties where we don't have to worry about the overbuilder issue for the purposes of the questions I'm about to ask you, okay?

A. Okay. I'm not sure what that means but...

Q. We'll let it go. So, for example, Burlington County was all Comcast, right?

A. That's what that looks like, yes, sir.

Q. Okay. And Atlantic County was all Lenfest?

A. I see that. I'm not sure what that little checked area is but –

[Page 80]

Q. Okay. Well, it's not another provider.

A. Okay.

Q. So that means that for those subscribers living in those areas the number of competitive choices available to them doesn't change.

A. The number of wire line cable companies wouldn't change for households in those two counties.

Q. Correct. And of course they had DBS' offered to them, right?

A. Yes, sir.

Q. And you did not do -- well, first of all, you could calculate and you could have calculated pre-transaction you could have done an HHI analysis for individual counties, right?

A. One could do that, yes, sir.

Q. One could do that, you did not do that, correct?

A. I did not.

Q. Okay. And if you did do that for any of these counties that just had one franchised incumbent in them the HHI's would be very high, right?

A. Well, they would be 10,000.

Q. Right, because there would be no other market, you're sort of not including DBS in that, I take it?

A. Oh, I -- yeah, you're right. I thought you just meant--

Q. But in any event we can even assume just for present **[Page 81]** purposes, the point is you do an HHI calculation for the DMA as a whole and what I'm trying to establish with you is you could have done one or you could do one for just individual counties and you would find sky high HHI's even before the transaction?

A. That's correct.

Q. Any of the transactions?

A. That's correct.

Q. So you would find very, very high levels of market concentration in entire counties within the DMA prior to the transaction?

A. That's correct.

Q. All the transactions, sorry. When I say the transaction

I mean all of the transactions.

A. The nine transactions.

Q. Yes, the deals at issue here.

A. Yes, sir.

Q. Now you didn't attempt to calculate HHI's beforehand or you didn't attempt to calculate HHI's, pre-deal HHI's on a county-by-county basis?

A. That's correct.

Q. If you had you would find that the, on a county-by-county basis that the pre-deal HHI's and the post-deal HHI's are the same?

A. If there was one cable company in a county, that's **[Page 82]** correct.

Q. Right? So what you also didn't attempt to do was to examine on a county-by-county basis what Comcast's penetration level was or Lenfest's penetration level was and what satellite's penetration level was.

A. That's correct, I did not do that on a county-by-county basis.

Q. And I think you described yesterday that if you just looked at it on a household or franchise level there would be a hundred percent penetration, right? You used that expression yesterday.

A. If you had a household that was a cable subscriber and that was the geographic market you were looking at, just that one household, it would have a hundred percent penetration.

Q. And you don't know so let's assume, okay, and I don't think you have any empirical data to the contrary, let's assume that pre-deal in Burlington County Comcast had 90 percent penetration.

A. Okay.

Q. And what then, the DBS provider had single digits penetration.

A. Okay.

Q. Okay? Now you haven't analyzed the specific impact of the transactions on a county-by-county basis?

A. That's correct.

[Page 83]

Q. We know now, we established the HHI is the level of market concentration in individual counties was sky high before the deals?

A. If you define the relevant antitrust geographic market to be in the county, yes.

Q. Right. Dr. McClave then goes and assumes that in individual counties, this, he screens out all counties where Comcast's penetration is 40 percent or higher, that's his but-for, one of his but-for screens?

A. That's what I thought.

Q. And where DBS penetration is below at least 20 percent. So if it's below the lowest DBS penetration Dr. McClave assumes is 20 percent.

A. Oh, I thought it was the nationwide average but go ahead.

Q. Well, it's a nationwide average but in every year of his sample it's at least 20 percent. So in order to get to Dr. McClave's but-for criteria aren't you assuming and he assuming and plaintiffs assuming and their experts assuming that what would have happened in Burlington County where Comcast had 90 percent and DBS had nine percent is that Comcast's penetration would have gone down 51 percent?

A. That's not correct.

Q. And that DBS penetration would have gone up over 20 percent. So let's say they were at eight percent by 13 percent, isn't the assumption -- and you're in part relying **[Page 84]** on Dr. McClave for impact, right?

A. Well, there's a lot of questions you just asked there but I just want to make sure that the record was clear. I answered your question no.

Q. Well, let's come back to our building blocks, okay? These are not counties that plaintiffs are saying any wire line overbuilder would have entered but for the deals, on an empirical basis?

A. But you lost me when you said which counties.

Q. I'm talking about the reason I selected Burlington and Atlantic, plaintiffs are saying RCN, I'm not accepting that, as you know, but that RCN would have entered Bucks, Montgomery, Chester, Delaware and Philadelphia.

A. Yes, sir.

Q. Five of the 16 counties.

A. That's what's in Dr. McClave's damage file, yes, sir.

Q. Okay. I'm leaving out so I'm focusing on the other 11 counties where the plaintiffs are not alleging that any predatory conduct directing at RCN kept them out but that's what I'm focusing on, that's --

A. I'm happy to focus on the five counties.

Q. No, not the five, I want to focus on the other 11.

A. Okay. I'm focused on the 11.

Q. Okay. And you have not seen any empirical evidence that any of the MSO's like Comcast, Lenfest or any of the others **[Page 85]** intended to overbuild each other, right?

A. Yes, I believe that's generally correct, yes, sir.

Q. In fact you've seen record testimony from Jerry Lenfest who plaintiffs deposed that he never would have overbuild anyone, he thought it was a lousy business, right?

A. I believe that's correct, yes, sir.

Q. And that he wasn't worried about Comcast overbuilding him?

A. I think that's correct.

Q. And you've heard, you've read record evidence where Brian Roberts of Comcast and Steve Burke of Comcast said the same thing, right?

A. I believe that's correct.

Q. And Mr. Burke repeated that testimony here yesterday uncontradicted, right?

A. That's correct.

Q. So -- so it is the case that the -- and it is the case that we're talking about counties where Comcast maybe have 90 percent and Lenfest had 90 percent and satellite had single digits. And in order for Dr. McClave's but-for counties to be able to provide a basis for the Court to make a finding that there is common evidence of antitrust impact, aren't-- isn't Dr. McClave in your understanding assuming, saying that in a but-for world in these counties and he looks county by county, in these counties Comcast's penetration or Lenfest's **[Page 86]** penetration would have gone from 90 to under 40 and that DBS penetration would have risen by 12 or 13 percent?

A. That's not correct.

Q. Well, Dr. McClave does make the assumptions in selecting his but-for markets, what he calls his competitive markets, he assumes that Comcast doesn't have penetration above 39 percent, right?

A. I think it was about 40 but go ahead, but that's --

Q. And that DBS has penetration above 20?

A. Above the national average, yes.

Q. So stay with me now just a little further. Let's assume that and, again, you have no empirical basis because you didn't study it to contradict me when I say that let's assume that there was 90 percent Comcast and Lenfest penetration respectively in Burlington and Cumberland, right?

A. I'll accept that.

Q. And we know that there's very high HHL's, right?

A. If we define those as relevant geographic markets.

Q. Okay. And we know what Dr. McClave's selection criteria are.

A. We do know that.

Q. So even if in these counties DBS penetration went from single digits, let's say it went from eight to 22 percent, okay?

A. Okay.

[Page 87]

Q. Let's say it had a 14 percent increase in penetration and let's say Comcast's or Lenfest's penetration went down by a exactly equivalent amount, 14 percent, they still lead at 76 percent penetration, right?

A. In your example, yes, sir.

Q. Because even if it -- so just the way the math would work, if you assume that there's a hundred percent penetration and that Comcast has 90 percent of that and the DBS providers have eight or nine percent of that and even if you assume that 12 or 13 percent of subscribers change hands that still leaves Comcast with penetration levels in individual counties or Lenfest way above 40 percent, right?

A. That's correct.

Q. And those counties, those counties, these counties would have been screened out of Dr. McClave's but-for model?

A. That's correct. He would not include a county that had a, where Comcast had a 76 percent penetration rate.

Q. So the very counties, the very counties that are at issue in the case and where Dr. McClave purports to make findings of impacting damages, even pre-deal, even if you assume these changes in penetration they would have been screened out of his model?

A. He would not include a county that had a Comcast

penetration rate of 76 percent, that's my understanding.

Q. And you don't know how many counties in the 16-county DMA **[Page 88]** fit the parameters that I've described for you in the model we're just building where Comcast or Lenfest or the other incumbent provider has 90 percent and the DBS company has eight or nine percent?

A. I'm not sure I understood the question.

Q. You don't know how many counties that actually provides--applies to empirically because you didn't study that?

A. I'm just not -- you're losing me when you say that applies empirical. I'm just not sure --

Q. You did not go, you did not look at individual counties and see what these penetration levels were?

A. That's absolutely correct.

Q. Neither did Dr. McClave for that matter.

A. Now that I don't know. I...

Q. He doesn't report that he did.

A. I don't -- I'm not certain.

Q. He's not an antitrust economist, he's not really in a position to assess competitive dynamics within a marketplace, is he?

A. I don't -- I'm not going to offer an opinion on what Dr. McClave is qualified to opine on.

MR. GOLDBERG: We offered him, your Honor, as a statistician and an econometrician and your Honor accepted him as such unchallenged.

BY MR. SHUSTER:

[Page 89]

Q. You are qualified to go in and look, you say you're qualified, that you could go into individual counties and see what competitive circumstances prevailed there in terms of penetration prior to the transactions?

A. I certainly am capable of evaluating, if I thought it was relevant, a county and to measure Comcast penetration rate.

Q. Well, even though Dr. McClave for damages purposes is working with counties analysis, you haven't fed him on individual county analysis of what competitive dynamics, what the competitive circumstances were and would have been on a county-by-county level in the Philadelphia DMA but for the deals?

A. That's correct, I did not define any geographic markets at the county level.

Q. And neither did Dr. Singer?

A. I believe that's correct.

Q. The only one on the plaintiffs' side that has looked at these on a county basis is Dr. McClave?

A. Yes, and he was not defining relevant antitrust markets.

MR. GOLDBERG: Your Honor, I have not been objecting to relevance, outside the scope of the direct examination. This is because there's no jury here and all we want to do is help your Honor. But this is all matters actually that was-- Dr. McClave was cross-examined on and expressed his opinion and if your Honor wants me to object I certainly will, but **[Page 90]** I'm just expressing I haven't been objecting because all I -- all we care about is that your Honor gets all the information that your Honor wants to have. But this is well beyond anything that we covered with Dr. Williams or would have covered with Dr. Williams.

MR. SHUSTER: This...

BY MR. SHUSTER:

Q. Now it certainly would be possible, would have been possible pre-deals to and, sir, for example, this, someone, if someone wanted to assert Comcast has excessive market power in Burlington County, subscribers in Burlington County prior to the deals if they wanted to assert Comcast has excessive market power in our county and they're abusing that market power, for those purposes they could have defined the geographic market to just include Burlington County, right? And that would work from an antitrust markets perspective?

A. I don't know what that means. If you're asking me could consumers in a county define a relevant geographic market?

Q. I'm saying that these individual counties can be examined as individual, separate geographic markets, isn't that correct?

A. You can define any, it doesn't mean it's relevant, doesn't mean it has any probative value but you could certainly mis-define any market you like.

Q. So it would be a mis-definition to define the individual **[Page 91]** counties as separate geographic markets?

A. For purposes of this investigation, absolutely it would.

Q. But I'm not talking about this, I'm saying pre-deal. The situation of subscribers in a Comcast county pre-deal or in a Lenfest county pre-deal were they -- where Comcast had 90 percent penetration.

A. Okay. I just want to make sure I understand when you say pre-deal, we're back to the so that Comcast acquiring --

Q. Pre-class period.

A. Okay. And you're asking me when Comcast acquired Lenfest was --

Q. Well, prior.

A. Okay, well, as a hypothetical antitrust investigation into Comcast's acquisition of Lenfest?

Q. Not into that, into whether Comcast had market power in an individual county, for assessing that you could define a market, a geographic market as that county to examine that assertion.

A. I have no opinion on whether or not, I haven't conducted a study of whether or not Comcast does or does not have market power at the county level, that has nothing to do with the plaintiffs' allegations in this case.

Q. Doctor, now, let's just -- oh, by the way, one of the things you also didn't do in addition to not advising yourself of what Comcast's penetration was at the county **[Page 92]** level or Lenfest's was or any other transaction counterparty, you didn't inform yourself on an empirical basis of what the satellite companies' penetration was in any individual county?

A. That's correct.

Q. And so therefore you didn't take, you as the liability expert, didn't take any such information and provide it to

Dr. McClave?

A. I did not calculate any relevant geographic markets at the time.

Q. But I'm not -- you didn't calculate any market concentration shares or penetration shares at the county level?

A. Well, market concentration shares would imply a relevant market.

Q. Okay. Well, then just penetration shares.

A. I did not calculate penetration rates at a county level.

Q. And neither did Dr. Singer, to the best of our ability-- to the best of your --

A. To the best of my knowledge.

Q. Best of your knowledge.

(Pause.)

Q. And even when the FCC just modeled out some HHI analysis in 2009, they did so focusing on individual zip codes, right?

A. That's -- you're talking about 2009 price report in their **[Page 93]** regression -- yes, they calculated an HHI at the zip code level, that's correct.

Q. So let's just be clear. The only HHI you're aware of that the FCC has done they did at the individual zip code level, not DMA-wide?

A. That's the only one I can recall, yes, sir.

Q. You have two --

MR. SHUSTER: Your Honor, this might be a good time.

THE COURT: Okay. Sure, what we'll do is, members of the -- what we'll do is we'll recess for lunch until, hopefully, 2:00 o'clock. I expect to be done the disciplinary hearing by that time and we'll go right back to this, okay?

MR. SHUSTER: Thank you, your Honor.

(Court in recess; 12:45 to 2:03 o'clock p.m.)

THE COURT: Good afternoon.

MR. SHUSTER: Good afternoon, Mr. Williams.

THE WITNESS: Good afternoon, Mr. Shuster.

BY MR. SHUSTER:

Q. Dr. Williams, you haven't done a study quantifying the effects of elimination -- is there an echo? Sorry.

THE COURT: There is. Go on.

BY MR. SHUSTER:

Q. You haven't --

THE COURT: What's the problem? There's an echo. **[Page 94]** It's okay.

MR. SHUSTER: Hard enough listening to my voice once.

(Laughter.)

BY MR. SHUSTER:

Q. You haven't done a study quantifying the effects of elimination of benchmark competition in the Philadelphia DMA, an empirical study using available data?

A. With the caveat that I did describe the survey this morning that I think does bear on this issue.

Q. Okay. But apart from that you haven't done any empirical study, any econometrics, anything like that?

A. Other than the survey, that's correct.

Q. The survey was phone calls to people, right, with questions?

A. Yes, sir.

Q. You're not aware of any economic study that quantifies the effects of benchmarking in the cable industry?

A. That's correct.

Q. You also agree there are benchmarks available in the Philadelphia DMA today?

A. There are non-Comcast cable companies still within the Philadelphia DMA, yes, sir.

Q. And you also agree that cable companies outside the DMA can be used as benchmarks?

[Page 95]

A. I believe in my deposition I said that I regard them further and further they get away there's a diminishing effect to their significance but I think at my deposition I said I don't regard the DMA as an absolute bright line beyond which on the other side of it non-Comcast cable companies serve no benchmark anywhere.

Q. And you know that Jerry Lenfest testified in this case that he never looked at other cable companies' prices when setting his own prices?

A. I don't recall that but I don't disagree with that.

Q. And the same for Dave Scott, the CFO of Comcast Cable?

A. Again I don't specifically recall it but I'm not disputing it.

Q. And of course how many different pricing areas does Comcast have within the alleged geographic market?

A. Mr. Burke yesterday said he thought -- he didn't know the answer but he thought it was several dozen, as I recall.

Q. Or more. Remember he said could even be hundreds?

A. I don't remember that but he --

Q. Okay. So and we know those rates vary quite a bit, right, there's quite a bit of variation in rates even within the Philadelphia DMA even just list prices or modal or –

A. You know, that's not something that's in my report so I think Dr McClave has more information on that.

Q. I mean subscribers can actually benchmark Comcast rates **[Page 96]** against itself, right, because its rates do vary?

A. They could certainly observe different rates charged by Comcast within the DMA, yes, sir.

Q. And the survey that you mentioned, that's phone calls for 400 people in four different DMA's?

A. Correct.

Q. And you don't have any pre-transaction surveys results to compare that to?

A. That's correct. Of course the point to it was to have a cross-sectional variation.

Q. I understand, by comparing it to other but in terms of level of awareness in Philadelphia you don't have a pre-deal survey to compare it to?

A. That's correct. I just I'm not sure when you say pre-deal.

Q. I mean prior to all the transactions, before the conduct that's complained of.

A. Yes, that's correct.

Q. And that was a -- there were phone calls to 400 people and the class consists of two million people?

A. Approximately, yes.

Q. Can you compute that fraction right now sitting here? I come up with .0002 percent of the class was contacted but I may be off, probably am terribly off. Even Dr. Chipty can't help me, all right.

[Page 97]

(Laughter.)

MR. GOLDBERG: It's a small percentage.

MR. SHUSTER: Thank you.

BY MR. SHUSTER:

Q. As far as subscribers go, if benchmarking occurs it's an individual household phenomenon, right? Somebody becomes aware of some other price and calls their cable company?

A. Well, insofar as it relates to an individual's decision to make the phone call but, just to be clear, I do regard benchmarking as a clustering-related phenomenon because it's the clustering that removes some many of the cable companies.

Q. But again you haven't, there's no study establishing that, no econometric study apart from the survey?

A. I just want to make sure I know what the "that" was.

Q. Establishing that there's a cluster-wide effect.

A. On pricing?

Q. Yes.

A. That is my understanding, yes, sir.

Q. In your reports you mention a loss of competition for franchises as one of the adverse

competitive effects. I want to know if you're still asserting that or if you dropped it.

A. It does not, from the description this morning, it did not play a role in one of the four mechanisms that I identified.

Q. Okay. So no -- go ahead, sorry.

[Page 98]

A. I'm sorry. I just, it's not that I'm disavowing it, it's just that it doesn't play a role in any of the four mechanisms that I identified for his Honor this morning.

Q. No longer forming a basis for your opinions?

A. I don't know if I'd go that far. I'm not, again, I'm not disavowing it, I'm just saying it didn't play a role in the four mechanisms that I've identified this morning.

Q. I've got to know one or the other, either I've got to ask you about it or we've got to dispense with it. So what is it, are you sticking with it or not?

A. I'm sticking with what's in my report, yes, sir.

Q. All right. So what franchises are coming up for competition in the Philadelphia DMA?

A. You mean coming up for sale?

Q. Well, yeah, no, coming up, I mean you're saying it diminishes competition for franchises, you mean for original franchise awards, right?

A. I'm sorry, could you try the question one more time?

Q. I thought when you were talking in your reports about a diminution in competition for

franchises you were talking about competition for original franchise awards.

A. That was one of the things I mentioned, yes.

Q. Okay. And what percentage of the Philadelphia DMA hasn't

been franchised out?

A. I am not familiar with any percent that has not been **[Page 99]** franchised.

Q. Okay. Did you make an effort to identify that?

A. I don't believe there are any brand new franchises coming up.

Q. Do you know when any of the franchises are coming up for renewal?

A. I don't, I don't specifically recall that.

Q. Have you ever done a study of the effect of competition for franchises on the basic, the rates for basic -- for expanded basic services?

A. I'm sorry, I just don't understand the question.

Q. Have you ever done a study of the effect of competition for franchise awards on expanded basic rates?

A. No, I have not.

Q. Are you familiar with any?

A. No, I'm not.

Q. Are you familiar with any study of the effect of competition for franchises in one franchise area on subscribers in another franchise area?

A. On the rates they pay?

Q. Yes.

A. No, I'm not.

Q. There continue to be several large MSO's both in and around the DMA who could compete for any new franchises that come up, right?

[Page 100]

A. In a renewal process?

Q. Yes.

A. Yes, there are other large MSO's around the Philadelphia DMA.

Q. You also had in your reports, you opined that there was a diminution of competition for acquisitions of other cable companies, if I understood it correctly, is that right?

A. Yes, in the -- specifically in the context of clustering.

Q. Okay. Are you sticking with that one or dropping it?

A. I -- I'm not disavowing anything in any of my reports.

Q. You agree there's no direct effect on subscribers from there being one less bidder in the market bidding for a cable system?

A. I do that the question was put to me in my deposition. I just want to -- I think if you, just to be clear, in my opinion a fair reading of the deposition is that I was very clear that I regarded the primary effect of the elimination of the other cable companies in the Comcast DMA as being the clustering effect, not the competition to acquire new franchises. But I

agree with you that I did testify and I agree that that, if we isolate out the clustering effect and just focused on the direct effect, if any, on subscribers resulting from a diminution in competition to acquire existing franchises then, yes, I stated in my deposition and I agree today that would not, that by itself would not have a **[Page 101]** direct effect on rate...

Q. You did not do an empirical study of overbuilding, period, question?

A. That's correct. Dr. Singer did several years ago and did another one in this test, in this proceeding.

Q. And you have presented two theoretical models concerning overbuilding, right?

A. That's, it's actually three but, yes, that's correct.

Q. And those models assume that overbuilding is profitable, right? Or did they not even assume that?

A. No, they -- it's a little more complicated than that but, yes, I think that's a fair statement.

Q. We'll break it down. They're pure theoretical models, right, they're not supported by any empirical studies that you've performed?

A. No, I wouldn't agree with, well, they are theoretical models and there's no empirical study of clustering that I have performed, that's correct. I do think they are supported by empirical work.

Q. You agree that overbuilding is relatively rare in the United States?

A. There are, I think their facts show that approximately one and a half to two percent of all homes are in overbuilt areas.

Q. So that's rare, right?

[Page 102]

A. I meant. I'm not going to dispute your use of the word "rare," it is what it is.

Q. The -- you have not conducted a study of the overbuilding industry?

A. My reports do not, do not contain a study of the overbuilding industry. I think that's fair.

Q. You're aware that the GAO has conducted a study of the overbuilding market, of the overbuilding industry?

A. Yes, I recall that.

Q. And you have reviewed that study?

A. Yes, sir.

THE COURT: I'm sorry, Mr. Shuster, I'm sorry, I missed the question. Will you repeat the question?

MR. SHUSTER: You're aware that the GAO has conducted a study --

THE COURT: GAO study.

MR. SHUSTER: GAO, yes.

THE COURT: Thank you. Okay.

MR. SHUSTER: You're welcome. May I approach, your Honor?

THE COURT: Yes.

MR. SHUSTER: Thank you.

BY MR. SHUSTER:

Q. Permit me to hand you, Dr. Williams, Defendant's 29. So this is the study you testified to a moment ago?

[Page 103]

A. I believe so. I don't -- I'm not specifically recalling this but this is -- is this a study that is cited in my report? I don't specifically recall that.

Q. It's actually, it is cited for another proposition, it's not cited for the -- on the subject that I'm going to ask you about which is generally the profitability of the overbuild industry.

A. Okay.

Q. So the GAO points out in the first page, if you look at the first page of text on the left the GAO describes the study it did and why it did it, do you see that?

A. Yes, I do.

Q. I'm not going to ask you about that, I'm just trying to help you get oriented to the document. And then if you look under the sort of the chart on that page, the second paragraph, the bottom paragraph says "The BSP's we interviewed have gained market shares but they've faced obstacles. The BSP's we spoke with are experiencing some financial difficulties and are putting off network expansion." Do you see that?

A. I do.

Q. And it says "Two of these companies currently lack the resources necessary to adequately market their services within their existing markets," do you see that?

A. I do.

[Page 104]

Q. And let me -- and if I direct your attention, Dr. Williams, to Page 5.

A. Yes, sir.

Q. Right at the bottom, "One of the reasons the BSP's are having trouble may be -- the BSP's may be facing more competition they have entered than they may have envisioned when they developed their marketing plans." You see that?

A. I do.

THE COURT: I don't. Are you on Page 5?

MR. SHUSTER: Page 5 at the bottom, your Honor, six lines, seven lines up from the bottom. "Second, the BSP's we interviewed."

THE COURT: Very well, thank you.

BY MR. SHUSTER:

Q. And now let me just -- we'll go forward. Give me a moment.

(Pause.)

Q. So let me ask you to turn, Dr. Williams, if I may, to Page 28 of Defendant's 29.

A. Yes, I'm there.

Q. And at the top of the page you see the conclusions?

A. Yes.

Q. Says "Although our study indicates there are measurable consumer benefits in markets with BSP's compared with markets without, the degree to which the BSP model is replicable **[Page 105]**

throughout a broader set of markets remains unclear."

A. I see that.

Q. And then the last sentence in that section says "The problems BSP's face may be mitigated as the current economic downturn of the telecommunication sector subsides but the long-term viability of these providers is not clear." Do you see that?

A. I do.

Q. And you haven't conducted any study that is inconsistent with those findings?

A. That's correct.

Q. And permit me to direct your attention to Page 36, Dr. Williams, of Defendant's 29, the GAO's BSP study.

A. Yes, I'm there.

Q. You see there that that's a table of markets entered by various overbuilders, traditional overbuilders or BSP's, broadband service providers, right? You see that, sir?

A. Yeah, I'm just trying to, I'm trying to familiarize myself with the table. I believe you're correct.

Q. And then it identifies total, the broadband service provider on the left, the markets under franchise in the center. Let's just stop there for a second, for RCN, it identifies six markets, right, that RCN has entered?

A. Six cities, yes.

Q. Yes, six cities, three of which are the clusters that are **[Page 106]** at issue in this litigation, right?

A. Yes.

Q. So half the places RCN entered are these clusters, right?

A. Yes, sir, yes.

Q. And it then in the next column identifies total households under franchise, you see that?

A. I do.

Q. And then in the next column it is a column for percentage of network constructed, you see that?

A. I do.

Q. And for RCN they get a low mark there, right?

A. Yes.

Q. And other overbuilders on the page, like if you go look towards the top to Astound, the second one down, they get a moderate in that column.

A. That's correct.

Q. And then there are several that actually get substantials, that they have done substantial buildouts and, of course, all but one of those is for 77,000 subscriber areas or smaller, right?

A. Yes, sir.

Q. Thank you.

THE COURT: It's admitted, D-29.

(Defendant's Exhibit 29 received in evidence.)

MR. SHUSTER: Thank you, your Honor.

[Page 107]

THE COURT: Okay.

BY MR. SHUSTER:

Q. Now your MSO overbuild model, so you developed one specifically with reference to MSO's with multiple system operators, we're talking about franchised incumbents, and then Dr. Teece criticized that model as not applying to traditional overbuilders. And then you developed one, another model to address traditional overbuilders, correct?

A. That's correct.

Q. The MSO model is a model of what you call a one-shot gain, right?

A. That's the technical term for it, yes, sir.

THE COURT: What's that mean?

THE WITNESS: It means that in -- in -- when theorists think about competition between firms you could think about it as extending over a whole series of periods on into the future, even in an infinite time period, if you like, or you could think about what happens in equilibrium or right after one period of competition. It's a very standard thing to do.

BY MR. SHUSTER:

Q. And of course real world, the real world is a repeated game, right?

A. Yes. Of course that certainly is not a, by itself that's not a criticism of a one-shot game. A one-shot game is **[Page 108]** trying to capture what the market looks like in equilibrium.

Q. I'm not saying it's a criticism, I'm just saying the real world is a repeated game, right?

A. I absolutely agree with that.

Q. And entering one time may cause somebody to respond in a way that ultimately induces you not to over-build, right?

A. I'm sorry, say that one more time?

Q. I'm saying, one-time entry by an MSO may cause the MSO whose market is being entered to respond in a way that induces the over-build entrant not to over-build?

A. That absolutely can happen, yep.

Q. And then there's a second half of your model, which is what if both firms build?

A. Both firms over-build.

Q. Right. Right?

A. Yes, sir.

Q. And, according to your model, it's not profitable when they both over-build into each other's territory?

A. That's correct. It's more profitable for them to forbear the over-building, over-building generates lots of competition.

Q. So, when two MSOs over-build each other, it destroys the profitability of MSO over-building, in your model?

A. I wouldn't say it quite that way. I would say it's more profitable for the two cable companies to tacitly agree, if **[Page 109]** you will, to not over-build into each other's territories.

Q. Well, regardless of whether they tacitly agree, the fact is, if they both do it, it's unprofitable,

right? That's what you testified to in your deposition, right?

A. Yes, it's --

THE COURT: Unprofitable or less profitable?

THE WITNESS: I would say -- yeah, I'm not sure I said unprofitable, I think I said less profitable, I should have at any rate.

MR. SHUSTER: Do you have -- let me see if I'm even going to use it, but meanwhile do we have a copy?

MR. GOLDBERG: No, I don't need it. I'm less concerned about myself as I am for the witness.

MR. SHUSTER: Yes, that would be helpful, I agree.

(Pause.)

MR. SHUSTER: Okay.

BY MR. SHUSTER:

Q. Yes, I'd like to hand you your deposition transcript, Dr. Williams, if we have it, please?

(Pause.)

MR. SHUSTER: Your Honor, may I approach?

THE COURT: Yes.

MR. SHUSTER: Thank you.

(Pause.)

BY MR. SHUSTER:

[Page 110]

Q. So, at Page 327, Line 14, you were asked --

A. I'm sorry, could I have just a moment?

Q. Please, please.

A. I'm sorry, what page?

Q. Page 327.

A. Thank you.

(Pause.)

A. Yes, I'm there.

Q. At Page 327 you were asked, at Line 14, "It's an underlying assumption of your model -- your other model for MSO is also that over-building is profitable, right?"

Answer: "The other one is a little more complicated, because if it's not profitable, remember we said there were two parts to it and the -- when they both over- build each other's territory, that's not -- that's not profitable."

You were asked that question and you gave that answer at your deposition, correct?

A. Yes, sir.

Q. And... just give me a second... and then if we could just look at the next question and answer, Line 23 on Page 327.

"Okay. So, it's profitable when just one MSO over- builds the other one?"

Answer: "That's correct."

Question, Line 2, Page 328: "That's the assumption **[Page 111]** in the model?"

Answer: "That's correct." Do you see that, sir?

A. I do.

Q. And those were the questions you were asked and those were the answers you gave, correct?

A. Yes, that's correct.

Q. By the way, MSOs could have been over-building each other for years, right? They had that freedom?

A. Absolutely.

Q. They've never done it?

A. Well, that's not correct, and in fact my deposition lists a long series of examples of MSO over-building.

Q. There's some areas where there's overlap because there's double franchises or whatever, but as a strategic business choice you're not aware that any MSO has undertaken over-building as a competitive business decision?

A. I'm not sure I can agree with that. There are -- I'm familiar with, I think, about 12 to 18, in that range, examples of over-building by MSOs.

Q. In the United States?

A. In the United States, yes.

Q. Affecting how many subscribers in total?

A. I don't recall. It's not -- it's not millions of customers, certainly.

[Page 112]

Q. Okay. As for --

MR. SHUSTER: -- is the -- was it up there? No, okay.

BY MR. SHUSTER:

Q. So that's MSO over-building, now let's talk about your traditional over-building model. First of all, that's also a theoretical model, right?

A. It is.

Q. And, again, the underlying assumption is that over-building is profitable, right?

A. Yes, sir.

Q. You don't have an opinion whether consumers would have this -- oh, and the way you model it is, you think of the world as a checkerboard consisting of 64 squares, right?

A. Well, that was an analogy I used in my deposition.

Q. Okay. You said you always think about this as a checkerboard, right?

A. In my deposition?

Q. Yes.

A. I may have.

Q. Okay.

A. I wasn't trying to --

Q. And what you were saying is that, all else equal, and over-builder would prefer to enter two different franchise areas that were -- where there were two different MSO **[Page 113]** incumbents, right?

A. Well, I think the answer to your question is yes. I was saying that the traditional over-builder would rather enter the checkerboard that had 64 different cable companies on it than the checkerboard that had one cable company on it.

Q. Okay.

MR. SHUSTER: Can we just pull up Map 2 again quickly, please?

Your Honor, may I?

THE COURT: Yes.

MR. SHUSTER: So, if you blow up the DMA?

BY MR. SHUSTER:

Q. So, this doesn't look much like a checkerboard even before the deals were done, right?

A. It doesn't look at all like a checkerboard.

Q. And in fact the empirical data show that the incidence of over-building is actually higher in cluster areas, right?

A. I don't agree with that, because I believe that's not in the context of a regression model.

Q. I'm sorry?

A. Your statement, I don't believe, is pointing to a regression model.

(Pause.)

Q. Can I direct your attention, if I may, to Page 341 of your deposition, sir?

[Page 114]

(Pause.)

A. Yes, I'm there.

Q. You were asked the question at Line 8, "Okay, but in the real world we don't hold these things constant. In the real world, in fact, there has been more over-building in clustered areas than un-

clustered areas because mainly that's where there's more money in it?"

Answer: "As I said, that's entirely consistent with the model."

A. I see that.

Q. And that was the question you were asked and the answer you gave, right?

A. Yes. I think, if you read the question before, it's very clear I'm talking about in Line 5 holding constant demographic and all of the profitability are variables. I mean --

Q. In your model?

A. No, that's not correct. What I'm -- the question was, empirically, is it true that clustering occurs -- I'm sorry, that over-building occurs more often in clustered areas and all I was pointing out was, you can't make an unqualified statement like that outside of the context of a regression model, you have to hold constant certain factors so you -- you can't just -- well, that was my point.

Q. Okay. Dr. Chipty performed such a model, correct?

[Page 115]

A. As did Dr. Singer several years ago and in this litigation, that's correct.

Q. Right, but I'm not asking you about Dr. Singer. Dr. Chipty performed an over-building -- specified an over-building regression model, right?

A. That's correct.

Q. You did not?

A. I did not. Well, actually what -- I'm sorry, I think you meant econometric model. I certainly did construct an over-building model, it was mathematical.

Q. I hear you. An econometric model, yes --

A. Yes, I did not construct --

Q. -- an econometric model based on empirical data?

A. I did not do that, that's correct.

Q. Now, coming to your bargaining-power model.

A. Yes, sir.

Q. You say that relates to what price the cable company is going to pay the network for its programming, right?

A. That's part -- that's part of the bargaining model, yes, sir.

Q. And it's predicated on what you model as an asymmetry in information as between the cable provider and the network?

A. That's part of the model, yes, sir.

Q. Okay. You haven't done an empirical study to support your bargaining-power model?

[Page 116]

A. I don't agree with that.

Q. Have you specified a regression model to do that?

A. I have not.

Q. Have you presented a model based on data reflecting carriage rates and -- programming carriage rates and prices in Philadelphia?

A. I -- I'm not sure if I understand the question. Run it by me again?

Q. Have you presented the data concerning carriage rates and subscriber -- meaning programming carriage rates that are charged by the programmer to Comcast on the one hand and then cable rates, Expanded Basic rates charged by Comcast to subscribers on the other?

A. I have not offered such data, no, sir.

Q. Now, just so we're clear, when we're talking about the difference between your models and regression models?

A. Yes, sir.

Q. Regression models specify a dependent variable and then various independent variables, and then they feed empirical data into the model and using those -- controlling for the various variables, they have an outcome that's based on the empirical data that's input into the model, right?

A. That's correct.

Q. Okay. Whereas your models are based on principles, theory and mathematics?

[Page 117]

A. That's correct, for the models we're talking about right now, that's right.

Q. Is the RCN foreclosure part of the case, is that part of your opinions that you're offering or is that Dr. Singer?

A. I would say that's Dr. Singer.

Q. Would you give me a moment?

A. Absolutely.

MR. SHUSTER: Your Honor, may I just confer?

THE COURT: Sure.

(Pause.)

BY MR. SHUSTER:

Q. Okay. Let's talk about SportsNet Philadelphia. It's your opinion that clustering increased Comcast's incentive not to license SportsNet Philadelphia to the DBS providers, correct?

A. That's correct.

Q. You know that Comcast decided -- declined to license SportsNet Philadelphia to the DBS providers long before the transactions that were at issue in this case?

A. That's correct, yes -- I don't know what you mean by long before, but it was --

Q. A few years before?

A. A few years before, yes, sir.

Q. Okay. That's what a lawyer means by long before, you're probably more precise.

[Page 118]

In fact, Comcast made that decision on the day it acquired the programming, October 1, 1997, right?

A. That's my understanding.

MR. SHUSTER: Could we just have the map for – just briefly for a moment again, please, if I may?

BY MR. SHUSTER:

Q. At that time, Comcast had the light blue area and none of the rest, right?

A. That's correct.

Q. But it still decided it was profitable for Comcast to decline to license Philadelphia SportsNet to the DBS providers?

A. That's my understanding.

Q. And that meant that it wasn't carried by the DBS providers in any of the other areas not owned by Comcast, right?

A. Yes, that's correct.

Q. Incidentally, in your table, when you set forth the evidence --

A. I'm sorry, which table?

Q. One of your tables, when you set forth your evidence for why this was profitable for Comcast or why clustering made it -- you don't include as the countervailing evidence the fact that Comcast actually decided to do it, the actual behavior of the defendant prior to the class period?

[Page 119]

A. I don't --

Q. I'm just saying you don't, right?

A. That wouldn't be -- that's not countervailing evidence.

Q. Comcast's own profit-maximizing behavior before the class period is not countervailing economic evidence as far as you're concerned, is that correct?

You don't have to look, because I'm asking you a different question.

A. I'm sorry, could you pose the question to me again?

Q. Comcast's profit-maximizing behavior prior to the class period in declining to license Philadelphia SportsNet to the DBS providers is not economic evidence that you think the Court should take into account when deciding whether there's common impact on the SportsNet issue from clustering?

A. No, I have never said that.

Q. Okay. You mentioned that the FCC's 2007 Program Access Order makes a finding of material adverse impact on competition from Comcast's decision not to license SportsNet, you have mentioned that in your direct, right?

A. Yes, sir.

Q. The FCC does not expressly refer to a price effect there, correct?

A. No, I wouldn't agree with the way you posed that.

Q. Does the -- the FCC uses the words, "material adverse impact," does not use the words, "that had an effect on subscriber prices"?

[Page 120]

A. The words "that had an effect on subscriber prices" do not appear in the sentence that I quote, that's right.

Q. Or anywhere else?

A. Well, that's a pretty broad question, but --

Q. In that report?

A. Not that I recall.

Q. And the FCC does not set forth any pricing study in that report or anywhere else directly measuring the impact of the non-licensing of SportsNet to the DBS providers on Comcast's Expanded Basic subscriber rates in Philadelphia?

A. That's correct, they simply find that it had a material adverse effect on competition in the video distribution market.

Q. Now, the GAO, Dr. Williams, has also studied the -- has studied the effect of DBS competition on cable prices, isn't that correct?

A. Yes, sir.

Q. Let me hand up to you, sir -- or maybe it's up there - Defendants' Exhibit 13.

MR. SHUSTER: Is it -- it's been marked, the Court may have it, it's an October, 2002 GAO report. It might be easier for you, Dr. Williams, if we just hand you a copy.

THE WITNESS: Yes, I don't have a copy.

MR. SHUSTER: Does the Court have one?

[Page 121]

THE COURT: Yes.

MR. SHUSTER: May I approach?

THE COURT: Sure.

MR. SHUSTER: Thank you.

BY MR. SHUSTER:

Q. I'd like to direct your attention, sir, to Page 44 of Defendants' 13.

A. Yes, I'm there.

Q. So, you see there that there's a reference in the text, starting in the bottom middle part of the page, "We found that DBS companies' provision of local channels is associated with significantly higher DBS penetration rates." Do you see that?

A. I do.

Q. And I think, as you describe in your report, "The provision of local channels or local-into-local by DBS, the DBS providers, was made possible by the Satellite Home Viewers Improvement Act of 1999," correct?

A. That's correct.

Q. And that was a fairly significant development for the -more than fairly significant development for the satellite providers being able to provide local-into-local programming, right?

A. I think that's a fair statement.

Q. And then the GAO goes on to describe that the DBS **[Page 122]** penetration rate in areas where local channels were available -- and just, sorry, to back up -- once they obtained the right to provide local channels, they then phased that in in different markets over time because they had to cut deals and they had to add satellites and all of that, right?

A. That sounds generally correct, I mean --

Q. Okay.

A. -- I don't specifically remember that.

Q. The point is, because the next sentence says, "Our model results indicate that in areas where local channels are available from both DBS providers the DBS penetration rate is approximately 32 percent higher than in areas where they're not available." Do you see that?

A. I do.

Q. And of course that -- they mean that it's 32 percent higher than it is in those markets. So that if it's six percent in those markets, then it's -- the local channels made a two-percent difference in absolute terms, right?

A. Yes.

Q. And then it goes on to say that "in areas where local is available, consumers are more likely to subscribe to DBS," right?

A. Yes, sir.

Q. And then there's another statement at the bottom there, the second-to-last line that is of interest, so I'm going to **[Page 123]** note it, but it doesn't go directly to the point I'm developing with you now. It says, "Our model results indicate that the DBS penetration rate is greater in non-metropolitan areas and in cable franchise areas that are outside the largest television markets." Do you see that?

A. I do.

Q. Now, going to the next page then, Page 45, right in the middle of the page, you see there there's a statement saying, "We did not find that DBS companies' provision of local broadcast channels is associated with lower cable prices"?

A. Yes, I see that.

Q. Okay. And they say that, in Table 3, "The estimate for this variable is not statistically significant and we, therefore, cannot reject the hypothesis that provision of local channels has no impact on cable prices."

A. I see that.

Q. "Even though it results in higher penetration by the DBS companies," right?

A. That's correct.

Q. And what we're talking about there is, prior to being able to provide local-into-local, the DBS companies only were able to provide national networks, right?

A. That's correct.

Q. So, now all of a sudden they have the ability to provide all of the local channels, right?

[Page 124]

A. Yes.

Q. Including sports programming that would be available on the local channels?

A. On the over-the-air channels, that's right.

Q. Right?

A. Yes.

Q. And the GAO finds that, even though that increases their penetration, it has no effect on cable prices?

A. That's what it says.

MR. SHUSTER: May I have a moment?

(Pause.)

BY MR. SHUSTER:

Q. And if I could show you, sir...

(Pause.)

MR. SHUSTER: May I approach, your Honor?

THE COURT: Yes.

BY MR. SHUSTER:

Q. Dr. Williams, I'm handing you what has previously been marked as Defendants' Exhibit 3. This is now an April, 2005 GAO report. Do you see that, sir?

A. I do.

Q. If I could direct your attention, Dr. Williams, to Page 33, you'll see that the finding is repeated.

A. I -- the -- I presume you're talking about the first sentence of the first full paragraph?

[Page 125]

Q. Correct.

A. Yes, I see that.

Q. Do you see that?

A. Yes.

Q. And then, following that, we have the FCC's 2009 report on cable industry prices, which has previously been marked as -- entered as Defendants' Exhibit 2, marked -- entered as Defendants' Exhibit 2. Do you happen to have that before you, sir, or should I just hand you --

A. I don't believe I have a copy of it.

MR. GOLDBERG: Do you have a copy?

MR. SHUSTER: Yes, we'll provide you a copy, give us a moment. Thank you.

(Pause.)

THE COURT: What is D-2?

MR. SHUSTER: It's the report on cable industry prices released January 16, 2009, FCC.

(Pause.)

MR. SHUSTER: Does the Court have its own copies?

THE COURT: I haven't found it yet.

MR. SHUSTER: Okay. Well, we can hand one up.

THE COURT: Okay.

COUNSEL: It's in the McClave binder that they gave your Honor yesterday?

THE COURT: Oh, okay.

[Page 126]

MR. SHUSTER: May I approach the witness?

THE COURT: Sure. And what tab is it in the McClave binder?

COUNSEL: Maybe Tab 9?

(Discussion held off the record.)

THE COURT: We did admit D-2. We're going to admit D-13 and D-3, if we haven't already done so.

COUNSEL: I think we have done so, your Honor.

MR. SHUSTER: Thank you, your Honor.

THE COURT: Okay, we're at D-2.

BY MR. SHUSTER:

Q. So, Mr. Korpus went over part of this with Dr. McClave, I just want to direct your attention, Dr. Williams, to Page 3 --

A. I am there.

Q. -- of D-2, Paragraph 3, which says that "cable prices decrease when a wire-line cable operator enters the market. It does not appear from these results that DBS effectively constrains cable prices." Do you see that?

A. I do.

Q. "Thus, in the large number of communities in which there has been a finding that the statutory test for effective competition has been met due to the presence of DBS service, competition does not appear to be restraining prices." Do you see that?

[Page 127]

A. I do.

Q. And then, if you flip forward to Page 5, which is the portion I don't think Mr. Korpus covered with Dr. McClave, Page 5 of Defendants' 2?

A. I'm there.

Q. You'll see that the charts, bar charts are presented there for the periods January 1, '06 and January 1, '07 and, on the next page, January 1, '08, right?

A. Yes, that's correct.

Q. And that essentially confirms the finding that DBS competition is not constraining Expanded Basic cable prices, right?

A. I don't agree with that.

Q. Well, it's -- you don't agree with it because it's not a regression study?

A. That's one part of it, yes.

Q. It's a histogram, as you describe it, right?

A. Well, it is a histogram, yes, sir.

Q. Okay. That's what it says, right? Those charts present prices in absolute terms and the first one, it shows that where there is DBS competition in Chart 2 the Expanded Basic price is actually above the Expanded Basic price where there is no finding of effective competition from the DBS providers. Are you with me?

A. I am, that's what –

[Page 128]

Q. And then in Chart 3 it shows a 24-percent difference between 47.49 and 47.25, and the third one shows an immoderate difference. Do you see that?

A. Yes, I think you said percent when you meant cents, but --

Q. Yes.

A. -- yes, these are the simple averages that they were looking at, that's correct.

Q. And the FCC is reporting, based on the information it has, DBS doesn't effectively constrain competition for prices?

A. That's what they wrote.

Q. And that was January of this year?

A. That's correct.

Q. And neither you nor Dr. Singer nor Dr. McClave has run a model of just the effect on Expanded Basic cable prices of the provision of regional sports programming by DBS providers?

A. I think that's generally correct. Of course, as you know, Dr. McClave takes the position that his damage model does in fact capture that as part of his benchmark calculation.

Q. That's his position, but he doesn't specify a model that directly estimates the price effects of withholding or providing a regional sports network to a DBS provider in any **[Page 129]** defined geographic market?

A. In any defined -- I think that's generally correct, although I think in answer to questions he said he could just aggregate that effect, if asked to do so.

Q. He hasn't done so?

A. Not to the best of my knowledge

Q. I actually think that -- I thought Dr. McClave testified that he could not disaggregate, didn't he say -- didn't he so testify here? You were listening.

A. If I have misstated his testimony, I apologize. I thought that's what he said.

(Pause.)

Q. A question came up earlier concerning -- okay. I'm going to read to you from -- Dr. Williams, I'm going to read to you from Dr. McClave's deposition testimony.

COUNSEL: No, Mike, from Day 1 of the hearing.

MR. SHUSTER: Oh, from his --

THE COURT: That's the notes of testimony of yesterday's hearing.

MR. SHUSTER: Yes, from his trial --

THE COURT: And it is my recollection he couldn't disaggregate, but you can read it.

MR. SHUSTER: Okay.

BY MR. SHUSTER:

Q. Page 182 -- thank you, your Honor -- Line 17, question:

[Page 130]

"Now, you yourself did not study how DBS penetration would be effective if Comcast made SportsNet Philadelphia available to DBS, right?"

Answer: "I did no such study, no."

A. No, I said that he didn't disaggregate --

Q. No, he said he didn't do the study, so --

A. -- that was a different question than could he have.

THE COURT: Okay. Continue.

MR. SHUSTER: Okay, thank you.

THE COURT: The witness makes -- the witness just made a point and that is that the question was whether or not Dr. McClave testified that he could or could not disaggregate, and the witness said that wasn't his testimony from his recollection, his testimony was that he didn't disaggregate, not that he couldn't. Is that the distinction?

THE WITNESS: Yes, sir.

MR. GOLDBERG: Well, Dr. McClave is right here in the back of the courtroom --

MR. SHUSTER: Well, yes, and --

THE COURT: Well, we -- go ahead.

MR. SHUSTER: Okay, that's a fair clarification and that is as it is.

THE COURT: Right.

BY MR. SHUSTER:

Q. A question came up earlier, Dr. Williams, as to whether **[Page 131]** the subject of regional sports programming was directly addressed in the FTC's review of the Comcast Adelphia/Time Warner transaction, do you recall that?

A. I recall that you posed the question of that.

Q. Okay. I just want to show you two exhibits quickly on that subject.

A. Sure.

Q. Defendants' 64 and 65, not previously used.

MR. SHUSTER: May I approach, your Honor?

THE COURT: Sure. Is it in the McClave binder?

COUNSEL: No, your Honor.

(Pause.)

MR. SHUSTER: Again, may I, your Honor?

THE COURT: Yes.

MR. SHUSTER: Thank you.

THE COURT: Okay.

(Pause.)

THE COURT: Okay, we have D-64 in front of us.

MR. SHUSTER: And there should be D-65 as well.

THE COURT: And D-65, yes.

MR. SHUSTER: Thank you.

THE COURT: We'll admit D-64 and D-65.

(Defendants' Exhibit Numbers 64 and 65 received into evidence.)

MR. SHUSTER: Thank you, your Honor.

[Page 132]

THE COURT: Okay. Questions, D-64?

BY MR. SHUSTER:

Q. D-64, Dr. Williams, let me direct your attention, if I could, please, to Page 4. In the middle -- the last full paragraph on the page, it says, "It was also very clear from the outset that the parties' principal objective in making the acquisition and asset swap was to increase clustering in the Time Warner and Comcast Cable assets."

And then, if you look at the first line of the next paragraph? Okay.

MR. SHUSTER: I should say, I should identify this for the record, this is a prepared statement of the Federal Trade Commission, it's titled, "Sports Programming and Cable Distribution, the Comcast/Time Warner/Adelphia Transaction," presented by Michael Salinger, Director, Bureau of Economics, before the Committee on the Judiciary, United States Senate, December 7, 2006.

BY MR. SHUSTER:

Q. So, forgive me for not doing that right at the outset, sir. And now if we could resume looking at Page 4, please?

A. Yes, sir.

Q. And you will see that then in the first sentence of the carry-over paragraph it says, "Against this background, the FTC staff examined a number of vertical theories of potential competitive harm."

[Page 133]

And then, if you flip over to the next page, the bottom paragraph says, "The investigation explored whether the increased clustering from the transaction made it more likely that Comcast or TWC would enter into the kinds of distribution arrangements that effectively foreclose their competitors in the video-distribution markets, UCC satellite, cable over-builders and telephone companies from carrying RSN programming."

Do you see that?

A. Yes.

Q. And then the top of the next page it states that "The FTC staff obtained significant evidence on the workings of sports programming markets, as well as each relevant geographic market affected by the transaction."

The top of Page 6, if I got ahead of you --

A. No, I'm with you.

Q. Okay. And then in the middle of the page or about -- three, four, five, six, seven -- eight lines down, the sentence that reads, "After careful consideration, the staff concluded for various reasons

that the evidence did not indicate that the proposed transaction was likely to make exclusive contracts profitable for either Comcast or TWC in the geographic markets impacted by the transaction."

Do you see that, sir?

A. I do.

[Page 134]

Q. And so that was with respect to Time Warner/Adelphia. And all Defendants' 65 is, and I don't even need to go through it with you, Dr. Williams, in fairness, are the information requests propounded by the FTC to the parties -- to the parties involved in the transaction.

A. Okay.

Q. It's not necessary for you to look at that.

Just one other thing on Defendants' 64, which I see you still have in your hands. If you go back to Page 4 of Defendants' 64, you'll see that the first full paragraph says, "As an initial matter, the FTC staff determined that TWC and Comcast were not acquiring any cable assets that competed with their existing assets; in other words, the transaction eliminated no horizontal competition between the parties." Do you see that?

A. Yes, I do.

Q. Thank you.

MR. SHUSTER: Your Honor, if I could have a brief moment to confer with my colleagues, please?

THE COURT: Yes.

(Pause.)

MR. SHUSTER: I pass the witness.

MR. GOLDBERG: I have some redirect, your Honor --

THE COURT: Sure.

MR. GOLDBERG: -- hopefully brief. I'm organized **[Page 135]** with respect to almost all of it.

THE COURT: Okay.

(Pause.)

REDIRECT EXAMINATION

BY MR. GOLDBERG:

Q. We went through a lot of documents this afternoon, Dr. Williams, I'm going to go back over a few of them. Mr. Shuster asked you -- showed you a lot of documents, most of them from Federal Government agencies, either the GAO or the FTC or the FCC, and either read to you or had you read parts of them, but I want to pay attention to some other parts of them, if you will.

Let's start with -- do you have Exhibit 37 in front of you? It was one of the very first documents, if not the first document, that Mr. Shuster showed you, it is the 13th Annual Report.

A. Yes, I have that.

Q. Do you have that in front of you?

A. Yes, I do.

Q. Do you recollect -- if you first take reference to Page 87, Paragraph 180?

A. Yes, I'm there.

Q. Mr. Shuster called to your attention and either had you read into the record or he read into

the record the beginning of Paragraph 180, do you remember that?

[Page 136]

A. Yes, sir.

Q. Would you take whatever time you want to review this, but I'm interested, if you will first read the last two sentences of Paragraph 180 that Mr. Shuster did not ask you to read?

A. Quote, "On the other hand, the Commission noted that clustering can present a barrier to entry for the most likely potential over-builder, i.e. an adjacent cable operator. The Commission further noted that while clustering may help reduce programming costs and other expenses, the Commission's findings reflect that these lower costs are not being passed along to consumers in the form of lower monthly rates."

Q. Would you continue and read the first few sentences of Paragraph 181?

A. "With respect to the specific issues raised in the Adelphia transaction, the Commission agreed with Comcast and Time Warner that clustering can lead to efficiencies and cost savings. The Commission found, however, that the companies failed to provide sufficient supporting evidence for the Commission to verify and quantify the claimed efficiencies and cost savings, or to determine the extent to which they would flow through to consumers."

Q. Go ahead and read further. The next one is the, "Although..."

A. "Although the Commission found that the potential public-interest harms of the transactions as conditioned were **[Page 137]** outweighed by the potential public-interest benefits, the Commission was not persuaded that the transactions would lead to a more competitive environment for the provision of the Triple Play of video, voice and data services."

Q. Go ahead and continue to read.

A. "Accordingly, the Commission did not find that the increased clustering would result in an improved competitive environment for video programming services."

Q. And then, finally, would you read the last sentence of that paragraph starting, "To the extent..."

A. "To the extent that the transactions, through clustering or through the proposed upgrades and deployment schedules, result in the addition of competitive facilities-based telephony service in Adelphia's former service areas, or to unserved areas where Comcast or Time Warner currently operate cable systems, the Commission found that consumers could benefit."

Q. Thank you. Now, you were -- when Mr. Shuster showed you that first sentence in Paragraph 180 you were aware of these other findings from the Commission?

A. Yes.

Q. And you took that into consideration when you yourself had looked at the 13th Annual Report?

A. Yes, sir.

Q. Why don't you explain to the Court what you took away **[Page 138]** from those findings by the Commission?

A. Well, I find that Paragraphs 180 and 181 are very consistent with what I told your Honor yesterday that I think that consensus opinion, the weight of the evidence, is that clustering, as found in study after study after study, leads to higher cable rates, all else equal. And you notice there's an interesting feature to Paragraph 181, which is the FTC is drawing the distinction between public-interest harms of the transactions were outweighed by the potential public- interest benefits, I cite that and discuss that in my reply report, because the FTC does not use the same standards that antitrust agencies use when they approve mergers or disapprove mergers.

Q. In fact, the Commission is weighing antitrust harm against other benefits that the Commission is interested in, correct?

A. Right, including such things as diversity, for example.

Q. And does this Exhibit 37 establish that the Commission here found that there was no harm to consumers arising from the clustering?

A. I would say the answer to that is no, in the cont -- that is, in the context of the transactions analyzed in that Adelphia/Comcast/Time Warner transaction.

Q. Is there anything else you want to say about Exhibit 37?

A. No, sir.

[Page 139]

Q. All right. Do you have Exhibit 29 in front of you?

(Pause.)

Q. I'm sorry, I'm not interested right now in Exhibit 29. Exhibit 43.

A. 43... yes, I have that.

Q. Exhibit 43, Defendants' Exhibit 43 is the FCC's report on cable industry prices in 2001. Do you remember Mr. Shuster asking you questions about that?

A. Yes, sir.

Q. And he had you read, I believe he had you read from Paragraph 39 and, I believe, also Paragraph 41.

A. Yes, sir.

Q. Would you read to the Court Paragraph 42?

A. Quote, "We further analyzed the effects of clustering on monthly rates using a regression equation similar to the benchmark equation. We found that operators that were part of a cluster had, on average, higher monthly rates than operators that were not part of a cluster. See Attachment D-1 for results of this analysis."

Q. You were aware of Paragraph 42 when Mr. Shuster made reference to other parts of this, is that correct?

A. Yes, sir.

Q. Explain to the Court what you take away from Paragraph 42 of Exhibit Defendants' 43 and why that's relevant to your analysis.

[Page 140]

A. Well, it supports my finding that, in the context of a regression model where econometricians are attempting to hold other factors constant, this is one more piece of the puzzle that, in my opinion, the weight of the evidence is that clustering of large MSOs, all other factors being held constant, leads to higher prices.

Q. At the beginning of your...

MR. GOLDBERG: ... may I have copies?

(Pause.)

BY MR. GOLDBERG:

Q. At the beginning of the cross-examination, Dr. Williams, there was this colloquy between you and Mr. Shuster about a standard for identifying what should be considered a cluster for -- whether it should be under a hundred or a hundred and above, do you recollect that?

A. 100,000, yes, sir.

Q. 100,000. And you referred to a standard used by Kagan and a standard used by the FCC?

A. Yes, sir.

Q. Is that correct? Let me show you --

MR. GOLDBERG: -- if I might approach the witness, your Honor? Exhibit 54, this is Plaintiffs' Exhibit 54, this is for the Court, if I might give one to the Court?

I've got a couple for you guys.

BY MR. GOLDBERG:

[Page 141]

Q. Do you have Exhibit 54?

A. I do.

Q. Is this a document that you relied on with respect to what you were talking about with Mr. -- as to what you understood was used as a standard when you testified in response to Mr. Shuster's questions?

A. Yes, sir.

Q. Would you explain to the Court what it is?

A. Well, the -- at the bottom you can see it says, "Kagan Research." So, I'm presuming that this is a document from Kagan. And it's a list of -- if your Honor would please turn to the second page of the document, at the top you can see it's entitled, "Major Cable TV Systems/Clusters," paren, "(100,000-plus Subscribers as of December, 2005)." And then the table consists of two pages in descending order listing clusters, descending down to the smallest one, shown on Page 3 of the document, Comcast in Augusta, Georgia with 106,343 subscribers.

(Pause.)

THE COURT: P-54 is admitted.

(Plaintiffs' Exhibit Number 54 received into evidence.)

MR. GOLDBERG: Thank you, your Honor.

BY MR. GOLDBERG:

Q. Do you have Defendants' Exhibit 2 in front of you? **[Page 142]** Defendants' Exhibit 2 is the January, 2009 FCC report from the cable industry.

A. Yes, I have that.

(Pause.)

MR. GOLDBERG: A lot of documents, your Honor.

THE COURT: It's okay, we got it.

MR. GOLDBERG: Okay. Thank you, your Honor.

THE COURT: Okay.

BY MR. GOLDBERG:

Q. Do you recollect -- before Mr. Shuster had shown this to you, you were familiar with this 2009 report on the cable industry prices, I take it, is that correct --

A. Yes, sir.

Q. -- Dr. Williams?

Mr. Shuster asked you to read from Paragraph 3 on Page 3 and then showed you a couple of what he called histograms and I call bar charts on Page 5, right?

A. Yes, sir.

Q. Okay. And, first, the language that he had you read into the record, from what part of the report is that language found?

A. It's -- I believe it's on Page 2, it's entitled, "Introduction and Executive Summary."

Q. That's a summary of the analyses and findings, as you read it, is that correct?

[Page 143]

A. Yes, sir.

Q. Does in fact this Exhibit 2, the report, does it actually report the actual findings and -- analyses and findings, not just a summarization of them?

A. Oh, absolutely, yes, sir.

Q. And were you familiar with those?

A. Yes.

Q. And when Mr. Shuster referred you to Paragraph 9 on Page 5 and the bar charts, you told him that you didn't agree with his characterization of the findings, as I recollect, is that correct?

A. That's correct.

Q. Could you explain to the Judge why you didn't agree? And make reference, if it's helpful to you, to the actual econometric analyses and findings, which I believe -- telling you where they are I think is carrying coals to Newcastle, but I think they're found in Appendix B at Page 81, right?

A. That's correct.

Q. Okay. Go ahead, sir.

A. Your Honor, the basic problem with this table is that the table really illustrates why regression analysis was invented, you just cannot make an uncritical comparison of simple averages and reach a conclusion that has any fundamental statistical basis to it. For the many reasons that Dr. McClave talked to you about and I have discussed, **[Page 144]** these bar charts don't hold constant the many variables that need to be held constant.

Q. Can I ask -- can I interrupt you for a second? Are those bar charts that are found on Page 5, are those a good starting point rather than an ending point?

A. I would say, yeah, sure, they're a good starting point. I think any -- in any statistical analysis you want to look at the raw data and that's

what this is, it's the raw data. But when you actually want to draw a scientifically based inference you don't just look at raw tables like this, you conduct a regression analysis. And, as both Dr. Singer and I have discussed at length talking about this very document and in particular, I won't go through all the details, but the appendix that Mr. Goldberg just made reference to, Appendix B starting at Page 81, the actual regression results here show the exact -- in my opinion, actually demonstrate the exact opposite proposition to what's discussed in the Executive Summary.

Q. What do the regression results, as opposed to what's stated in the Executive Summary and what's stated in those bar charts, what do the statistical results of that regression model show you, Dr. Williams?

A. Well, your Honor, could we please take a look at Page 85? And obviously I won't go through all the details here, but I would just draw your attention to a couple of the variables. **[Page 145]** The first is, notice that the variable, "log income." So, in other words they've held constant income here. By holding constant income, they've actually controlled for the factor that is, in my opinion and Dr. Singer's opinion, actually causing the bar charts to look the way they do. If you think about it for a moment, what's really going on in these bar charts is that there is a correlation between where there's substantial DBS penetration and where the -- and we know that cable companies tend to charge higher prices in high-income areas. So, the uncontrolled variable from the bar charts is income, as you have higher DBS penetration and higher cable prices in high-income areas.

So, when you go to the regression and you see they've held constant income, now they've held constant the variable that's not being held constant in the bar charts. And I won't go through all the details, but when you look at that variable called, "log HHI," I would encourage your Honor to take a look at Dr. Singer's report and my report, because we explain why, in this context, that LHI variable is actually picking up DBS penetration, in our opinion. What is -- actually, Mr. Shuster drew a reference to it this morning when he said, isn't there an HHI variable that the FCC has measured at the zip code level? This is what he was talking about, that is that HHI variable is showing the different ownership shares at the zip code level and the only reason **[Page 146]** that that -- or the primary reason that HHI variable, the ownership variable is changing is because of differences in DBS penetration rates by zip code. And you see that there's a positive and statistically significant sign on it and, as Dr. Singer and I both discuss in our reports, what that's really showing, in our opinion, is that increased DBS penetration is associated with lower cable prices.

Q. And that's consistent with your findings in this case?

A. Absolutely.

Q. That is, the greater the DBS penetration, the lower the cable prices?

A. Absolutely.

Q. And that's consistent with the mathematical models that you have presented in this case and the opinions that you've presented in this case?

A. Yes. All the mathematical models I present in this case have one very desirable feature, from my perspective, and that is that they're consistent with this, in my opinion, fundamental relationship between large, highly clustered MSOs and higher prices.

Q. Okay. Thank you very much.

MR. GOLDBERG: And, your Honor, if your Honor has more questions, that's fine. We're done with Dr. Williams and we're done with our case.

MR. SHUSTER: May I?

[Page 147]

THE COURT: Yes.

MR. SHUSTER: Thank you, your Honor.

THE COURT: Within the confines of the redirect.

MR. GOLDBERG: Subject --

MR. SHUSTER: Yes, your Honor.

MR. GOLDBERG: -- subject to the recross, your Honor.

RECROSS-EXAMINATION

BY MR. SHUSTER:

Q. Dr. Williams, you stated that in reference to the FCC's statement and findings that DBS competition doesn't constrain cable prices, you stated you don't just look at raw tables, you conduct a regression, right? That's what you said a minute ago.

A. Well, no, I -- it sounded like, the way you posed your question, you said I did it. But, no, I said that to draw a legitimate scientific-based opinion, I think you need to do a regression analysis.

Q. You didn't do that?

A. I did not do that.

Q. Dr. Singer didn't do that?

A. I just want to make sure of the that. Are you talking about the relationship between DBS penetration and cable rates?

Q. Yes.

[Page 148]

A. Yes. No, I don't -- Dr. Singer did not do that, that's correct.

Q. And so what you're now doing is you're interpreting the FCC's regression in some way that you think -- you and he think, if the FCC had only studied their regression more carefully, they wouldn't have reported the result that they reported on Page 3, is that what you're saying?

A. I'm saying that, in my opinion, the regression is inconsistent with the inference that they drew from looking at the simple averages.

Q. Okay. Now, they didn't estimate a model for the effect of just DBS competition on cable prices -- sorry, DBS penetration on cable prices?

A. I'm sorry, could you try the question again?

Q. The FCC did not estimate a model to address the effect of DBS penetration on Expanded Basic cable prices, right?

A. Yes, they do not have a separate, stand-alone DBS penetration-rate variable, that's correct.

Q. Okay. Now, let's go back for a second to Paragraph 180 of Defendants' 37.

A. Okay.

(Pause.)

A. Yes, I'm there.

Q. And if you could also get out Plaintiffs' 75, your table?

A. Oh, sure. Which table?

[Page 149]

Q. Page 22 --

A. Page 22.

Q. -- Table 4, Table 4, Dr. Williams.

A. Yes, I'm there.

Q. Okay. You said that -- Dr. -- Mr. Goldberg asked you - - -

MR. GOLDBERG: I am not a doctor.

BY MR. SHUSTER:

Q. -- asked you to -- I'm going to need a doctor - - Mr. Goldberg asked you to read some additional paragraphs, 180, 181 and so on. But, coming back to this, this is the paragraph, Paragraph 180, that in your table you say, "The Commission has found that clustering can lead to higher cable rates," right?

A. That's correct.

Q. And that's the statement you earlier confirmed to me was inaccurate and that this report does not say that, right?

A. Well, I think what I said was --

Q. That's -- go ahead.

A. Just to be clear, I think what I said was the sentence doesn't specifically -- the sentence says

what it says, but the sentence didn't -- it says that lower rates were not being passed through. So --

Q. Okay.

A. -- cable rates were not falling.

Q. Right. The Commission did not state, in words or **[Page 150]** substance, a sentence that says, "The Commission has found that clustering can lead to higher cable rates," right; it's not in the report that way?

A. I don't recall that being in there.

Q. Okay.

MR. SHUSTER: No further questions.

THE COURT: Okay. Thank you, Dr. Williams. You may step down.

THE WITNESS: Thank you very much, your Honor.

(Witness excused.)

MR. GOLDBERG: Your Honor, this is the close of plaintiffs' live testimony. Your Honor, as said, all of the reports are on the record, as well as all of the exhibits. And we have closed our case subject to their case.

I didn't want to let this opportunity go by without saying, on our behalf and I'm absolutely positive on behalf of all of the defense lawyers, how much we appreciate all of the time that your Honor is taking to listen to all of this. Listening to market definition at 4:30 in the afternoon is probably not the way you want to spend your afternoons, your Honor. We understand that, but the lawyers appreciate this.

THE COURT: Okay. What do we do now?

MR. SHUSTER: I do want to make an argument that they haven't made a prima facie showing.

THE COURT: Do you have a witness that we can finish **[Page 151]** within an hour?

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW BEHREND, et al.	:	CIVIL ACTION
	:	NO. 03-6604
	:	
v.	:	Philadelphia,
	:	Pennsylvania
COMCAST	:	October 26, 2009
CORPORATION, et al.	:	9:30 o'clock a.m.
	:	

. . . . . .

HEARING

BEFORE THE HONORABLE JOHN R. PADOVA

UNITED STATES DISTRICT COURT JUDGE

* * *

[Page 6]

THE WITNESS: Good morning.

THE COURT: You may proceed, Mr. Shuster.

We are going to receive into evidence, we have I guess already received into evidence, all of Dr. Chipty's reports that have been submitted in Tabs 1 through 5 of the Chipty binder that was given to the Court by the defendants -- by the defendant in this case. All of those reports will be considered direct examination. We have, however, granted defendants some supplemental time to clarify or add to the direct examination, and that limitation is approximately a half hour.

You may proceed, Mr. Shuster.

MR. SHUSTER: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. SHUSTER:

Q Dr. Chipty, Dr. McClave testified that he had to study up on the cable industry for this assignment; did you or were you already familiar with that industry in the course, ordinary course of your work?

A I have been studying the cable television industry for over --

THE COURT: I do see that in your curriculum vitae, Doctor, and we are thoroughly satisfied. I don't think there's any objection to your expertise with respect to the econometrics that are involved in the analysis and in the **[Page 7]** judgments that have to be made in connection with this case, and we certainly do receive you as an expert in such econometrics.

Is the proffer of this witness as an expert broader than that?

MR. SHUSTER: Yes.

THE COURT: Let me hear it.

MR. SHUSTER: Antitrust economics, econometrics and an expert in the cable industry, your Honor.

THE COURT: Any objection?

MR. GOLDBERG: We have no objection, your Honor.

THE COURT: We do accept the Doctor as an expert in this case.

MR. SHUSTER: Thank you, your Honor.

BY MR. SHUSTER:

Q Dr. Chipty, I may lead you a little in the interest of time, but I want to know, you did -- as the Court knows, you did your own empirical studies of the relationship, if any, between clustering and pricing, why did you consider it necessary to do your own studies for this case?

A Well, I am familiar, as I think the record shows, with the existing literature, both the academic studies and the government studies in the cable industry, and if you look at those studies, many of which were cited by Drs. Singer and Loehmanns (ph), what you see is that they don't actually **[Page 8]** study clustering in the way that would be useful to evaluate the issues here, that is what was the effect of the transactions at issue on prices to subscribers in the Philadelphia area. The FCC studied clustering in 2001 and 2002 -- excuse me, I'm sorry, in 2000 and 2001, and in those studies they used a binary for clustering, either an area was clustered or it was not. And, by the FCC's model, there would have been no effect of the transactions at issue in the Philadelphia area because the area was clustered before the transactions and it was clustered after the transactions. So, if you were to apply something off the shelf, what you would find is that there was -- you would have to reach a conclusion of no impact, but that's because of the limitations of those studies, not really any sort of substantive information –

THE COURT: Dr. Chipty, put that within the context of aggravating factors. Okay? Let's assume you're right in that regard, but there's additional anticompetitive conduct that does affect continued competition growth, wouldn't that be one approach to determining -- to using the FCC's studies, along with

other things, to determine antitrust impact? In other words, antitrust impact doesn't necessarily have to be initial, it can be as a result of aggravating factors, can't it?

THE WITNESS: I guess, your Honor, I'm not sure what **[Page 9]** you mean by aggravating factors.

THE COURT: We take a situation as it exists the day before anticompetitive conduct. Okay? And we match to it the situation that exists the day after --

THE WITNESS: Yes.

THE COURT: -- anticompetitive conduct to see whether or not the market was aggravated, aggravated in the sense that competition was lessened.

THE WITNESS: Yes.

THE COURT: Okay?

THE WITNESS: Yes.

THE COURT: Wouldn't that be an acceptable approach to antitrust impact?

THE WITNESS: Yes, in principle, I agree with you and, in fact, that's what I am saying that the FCC studies can't be used to address, because what they're measuring is the effect of clustering as a binary, they're not looking at the effect of a change in cluster size. The subscribers in the Philadelphia area were always certified clustered cable operators, they were clustered before the transaction and all of the -- cumulative, all of the transactions, they were clustered --

THE COURT: When were these transactions?

THE WITNESS: The first transaction begins in 1997.

THE COURT: Okay.

[Page 10]

THE WITNESS: Okay?

THE COURT: And the FCC studies?

THE WITNESS: And the FCC studies, the first FCC study of the effect of clustering was in 2000, using data from a year or two prior.

THE COURT: Okay. Were there transactions after 2000?

THE WITNESS: Yes. In fact, the biggest transaction was the Linfax (ph.) transaction, which closed some time in January of 2000.

THE COURT: All right. So, the 2000 study, does the 2000 study -- is the 2000 study probative with respect to competitive factors as of the time it was done?

THE WITNESS: It was probative with respect to the issue of clustering, but not with respect to the effect of the transactions at issue here.

THE COURT: All right, you can . . .

MR. SHUSTER: Thank you, your Honor.

BY MR. SHUSTER:

Q So, you did your own regression studies of pricing and clustering?

A Yes, I did.

Q Okay.

MR. SHUSTER: Your Honor, may I hand up Dr. Chipty's demonstratives?

[Page 11]

THE COURT: Yes. Thank you.

(Pause.)

BY MR. SHUSTER:

Q And your study, as you reported in your reports, let's start with Chart A --

MR. SHUSTER: -- Joe, you can put that up, please, if you can; if you can't, it's no worries, because the Court has the demonstrative.

BY MR. SHUSTER:

Q So, you looked at -- why don't you very, very quickly tell us what this chart and the next one show? Start with this one.

A Well, this chart summarizes all of the different variations to my modeling assumptions that were all designed to affirmatively explain and evaluate whether in fact there was any impact associated with the plaintiffs' allegations. In particular, in Slide A, it's about the price model. The question that I was trying to evaluate -- there were two actually -- first, whether prices in Philadelphia are higher than prices outside of Philadelphia --

THE COURT: As of what point in time?

THE WITNESS: -- all else equal. Well, depending on the rows of this chart, your Honor, at different points in time. The first row, my Fact Book analysis looked at the year 2008, there is Fact Book analysis I present that looks **[Page 12]** at changes in prices from 1999 to 2008, and then all of the Comcast-specific pricing analysis looks at the years 2003 to 2008, the years for which the Comcast data were available.

BY MR. SHUSTER:

Q And just to describe what you did here, you did a first study using Fact Book data. The defendants' experts then criticized you for using Fact Book data, so you used Comcast data and came up with the same results?

A That's correct.

Q And then you -- you used their clustered -- they criticized your clustered definition, so you used their clustered definition?

A That's correct.

Q And came up with the same results?

A That's correct.

Q They criticized you for using Boston and Chicago; you dropped Boston and Chicago, came up with the same results?

A That's correct.

Q They criticized you for using the year 2008 only, so you looked at 2003 to 2008, the same period covered by Dr. McClave, and you came up with the same result?

A That's correct.

Q And then you used his model with your appropriate corrections and came up with the same result?

A That's correct.

[Page 13]

Q And then in the next chart -- and describe to the Court why it's important that you came up with the same result -- you came up with the same

result even though you used all of these variations to your original reports -- to your original approach in response to defendants' criticisms?

A Sure. Your Honor, what I was essentially trying to demonstrate and also evaluate in the course of this work is whether the result that I found in the first instance is what we call robust in sort of our statistics jargon. And what I mean by that is whether -- I was evaluating in large part to criticisms and also for probative value whether there were specific design decisions that I made that were essentially rigging the answer. And so, you know, on Fact Book the criticism was, well, there's measurement error in these prices and that's somehow causing the result that I found, and I found that was not the case because the same results repeat with Comcast's own price data. Then there were issues with the cluster algorithm. Again, I would -- I maintain the position that that is -- that the cluster algorithm is an incredibly legitimate and useful tool, but it's not driving the results. We can use a different mechanism to identify groupings of systems into clusters.

And so throughout this exercise what I find is that there is a really robust and stable finding that, when you control properly for the things that you should control for, **[Page 14]** you find overtime, you find the cross-data sets, you find that prices in Philadelphia appear to be determined by the market fundamentals and are not noticeably different from prices anywhere else.

Q Okay. And then the next chart, A-1, what we did -- and we really did this for the convenience of the Court -- identifies the various exhibits in your reports where you respond to the various criticisms -- where you put forward your initial affirmative find-

ings and then respond to the various criticisms of your work put forward by the defendants -- by the plaintiffs' experts?

A That's correct. Chart A-1 was just meant to be a facilitating tool. All of these results are contained in the reports, it's just meant to help refine the --

Q It's just a road map.

THE COURT: Do you agree, Doctor, if there were -- and I know it's a very, very big if -- if there were antitrust impact as a result of the conduct that they complain about in the complaint in this case, then that antitrust impact should be able and should have been able to be demonstrated by common evidence?

THE WITNESS: Well, I want to say yes and no, because that's a really --

THE COURT: Yes and no's are -- or I'll hear you, go ahead, say yes and no --

[Page 15]

THE WITNESS: -- if you --

THE COURT: -- but I'm going to -- I'm going to hope that you can do better than that for me and, if you can't, then you just tell me you can't and tell me why.

THE WITNESS: I think I can, let me try. Okay?

THE COURT: But, remember, I mean, you're using common evidence --

THE WITNESS: Well, I think --

THE COURT: All right.

THE WITNESS: -- that this is where I say --

THE COURT: And you reach a conclusion that there's no antitrust impact and shouldn't I take from that, that common evidence, that if there were antitrust impact, it should have been able to be demonstrated by common evidence?

THE WITNESS: Well, it's an excellent question, and let me try to explain. On the one hand, I do think we can use regression analysis, which -- as I do, to evaluate whether on average there is an effect, that's the best regression analysis can do. If I take a room full of people and I try to use regression analysis to estimate sort of the tendencies and trends in this room, what I'm going to pick up is the average effect. So, for example, if I am going to estimate the effect of gender on height in this room and I run a regression -- although there are only two or three women, I think, I would have a little bit of a problem, but **[Page 16]** suppose I had a healthy population of both, what I would find is the average effect of gender on height. That's not to say that some women aren't taller and some men aren't shorter, it's just the average of the --

THE COURT: I'm not asking you -- I'm not asking you --

THE WITNESS: Okay.

THE COURT: -- whether or not a common-evidence approach is either the best possible approach or is right 100-percent, I'm just asking you whether or not in this case, as you understand the plaintiffs' case, isn't it so that if there were antitrust impact they should have been able to demonstrate it through common evidence?

I'm not asking you whether that common evidence would be compelling --

THE WITNESS: Your Honor, I understand, I understand --

MR. SHUSTER: Can I try and get at it?

THE COURT: You sure can, you sure can.

MR. SHUSTER: Let me try and get at it, let me try and get at it.

THE COURT: You sure can.

THE WITNESS: I have a second part that I would like to get at, but --

BY MR. SHUSTER:

[Page 17]

Q Okay. Well, go ahead then.

A Well, essentially where I'm going with where I started is that what I think you can do with regression analysis and methodology is to get an average effect. In a situation like this where I find effect, what that means is one of two things has got to be true. On the one hand, it is possible that there's really no impact to anybody in the class, and on the other hand it's possible that you have some people who had an effect and some people who didn't, but the methodology cannot tell you who is who and which person is in which circumstance.

THE COURT: Okay. Well, I'm only talking about whether or not it's evidence. Now, you know, we prove facts circumstantially, we don't have to prove facts with certainty, but ordinarily the standard is more likely than not. I'm asking whether it's common evidence of -- if there were any antitrust impact, they should have been able to demonstrate it through common evidence.

THE WITNESS: That's right, I think it's --

THE COURT: Is that -- are you telling me yes or no?

THE WITNESS: I'm telling you that, yes, you can use this as common evidence of average impact.

BY MR. SHUSTER:

Q But let's come back to the core propositions here, because you were testing -- you were addressing as a **[Page 18]** threshold matter whether there's any relationship between clustering and prices, as plaintiffs say.

A That's right.

Q Do you accept the fact that this can -- that this should be evaluated on a DMA-wide basis?

A No, I don't accept that.

Q Given the nature of plaintiffs' specific allegations that the transactions eliminated or reduced or impaired overbuilding, is it appropriate to evaluate those allegations on a DMA-wide basis?

A No, I don't think it's possible, I don't think it's sensible and I don't think that -- well, plaintiffs haven't even assessed anything having to do with the effect of clustering on overbuilding, they just haven't.

Q They haven't put anything forward in that --

A No, they have not.

Q -- no study, no empirical study?

A No.

Q But if you're evaluating overbuilding, in the normal course of your work and what economists do in this industry, do you look at the whole DMA or do you look at specific franchise areas where overbuilders are likely to come in?

A Well, you have to evaluate overbuilding at a franchise-by-franchise level because that's how the entry occurs.

So, when we're talking about impact, you understand we're **[Page 19]** talking about impact flowing from the specific allegations plaintiffs have made, right?

A That's right.

Q And now the Court -- okay. So, we just talked --

A That's right.

Q So, we just talked about overbuilding, now let's talk about the other possible aggravating factors the Court may have in mind based on plaintiffs' own allegations. The conduct allegedly directed at RCN, do plaintiffs even allege that conduct is DMA-wide?

A No. I believe plaintiffs' allegations are that RCN would have entered as an OBS overbuilder in five counties but for the allegations.

Q Okay. I want to stick with the point we're talking about, but let's digress for one second. In your opinion as an economist, have the plaintiffs shown that but for Comcast's conduct RCN would have come in as an OBS provider in five counties and, if not, why not?

A I don't think that they've met that burden. I think that the only evidence that they point to is the fact that RCN has not entered, they observed that RCN had approved --

THE COURT: There was some testimony --

THE WITNESS: -- franchise licenses --

THE COURT: -- that RCN had applied in some of the franchise areas, wasn't there?

[Page 20]

THE WITNESS: Yes, yes. And in fact they received franchise licenses --

THE COURT: They did?

THE WITNESS: -- your Honor, in most cases --

BY MR. SHUSTER:

Q They received licenses from the FCC, right?

A From the FCC and the local authorities. They applied for the authority, they received the authority, but they never actually entered, and the fact that they didn't enter is what plaintiffs are pointing to as evidence of anticompetitive behavior.

THE COURT: They didn't enter it because they needed local sports programming and Comcast wouldn't give it to them?

THE WITNESS: RCN always had the local sports programming --

THE COURT: Well --

THE WITNESS: -- so --

THE COURT: -- plaintiff --

THE WITNESS: -- so --

THE COURT: -- I'm telling you what plaintiffs' case is, that you understand it to be.

THE WITNESS: Yes, yes. But I understand plaintiffs case to be about DBS and RSN withholding, but I think if you actually look at the OBS situation, RCN applied for and **[Page 21]** acquired OBS licenses not just in Philadelphia but in other parts of

the country; for example, in Oregon and in Seattle, Washington. In many of the places where it actually had the authority to enter, it actually chose not to enter. It chose not to enter --

THE COURT: Well, how do we know that?

THE WITNESS: Well, because you can read it in their 10(k)s, in their financial filings before the SEC, RCN --

THE COURT: Well, I don't --

MR. SHUSTER: It's in our reports --

THE WITNESS: -- it --

MR. SHUSTER: -- it's in our reports. Let me see what I can do to help, but it's in our reports.

THE COURT: Well, just make a note and you can point it to me --

MR. SHUSTER: Yep, okay.

THE COURT: -- at a later --

THE WITNESS: I believe it's in my May 6th report, but we can get you specific citations, it may even be circa Page 20, but --

THE COURT: I have another question, I have another question. Evidently, Doctor, you very strongly believe that the approach of the plaintiffs' experts in this case is wrong, primarily because -- not that there's anything wrong with regression analysis, that's an acceptable methodology, **[Page 22]** but in this case they employed no empirical -- they didn't do any empirical studies at all --

THE WITNESS: That's correct.

THE COURT: -- is that correct?

THE WITNESS: That's correct. That's in part -- Dr. Williams doesn't do any original empirical work --

THE COURT: How about Dr. McClave?

THE WITNESS: Dr. McClave does put forward a regression model, he put forward the one regression model that --

THE COURT: That's what I wanted to clarify.

THE WITNESS: Yes, yes.

THE COURT: Okay. So, you do recognize that Dr. McClave did present at least that empirical study?

THE WITNESS: Yes, he did, he did. But there I have other issues and which I talked about and I can --

BY MR. SHUSTER:

Q But isn't there a difference between using regressions, coming back to your earlier point, to show impact on the one hand and damages on the other hand? Damages, we know, there's a little more latitude, but what's the danger of trying to use regressions, class-wide regressions here to show impact?

A So, your Honor, Dr. McClave's regression mode is at the county level, that means that his assumption from the get-go, **[Page 23]** with the regression model, is that within the county consumers are essentially the same, that there's no heterogeneity among consumers within the county, and that's just not true here because of the nature of the allegations. And, as I have said, if you were even going to attempt to use a regression model to identify individual impact, to see if there's common class-wide

impact, you would have to build a much more granular study, one that I don't even know is possible given available data. For example --

THE COURT: Well, you did studies and you demonstrated a lack of antitrust impact, what if they did studies that were as granular as your studies?

THE WITNESS: I would -- that's a really good question, but I have to say, from -- my study cannot establish that there is common class-wide impact, it can only establish --

THE COURT: It can only establish that there isn't?

THE WITNESS: -- that there is not.

THE COURT: You better tell me about that.

THE WITNESS: Yes.

THE COURT: Why?

THE WITNESS: So, this is where I was trying to go before and --

THE COURT: I didn't perceive that point, but now that you've told me, it's an interesting point and I am **[Page 24]** interested in it. So, go ahead.

THE WITNESS: Let me try it again. So, there is this asymmetry between being able to show there's no effect versus that there is an effect. If there is no effect, I don't need to identify, oh, there was no effect for this household, there's no effect for that household. If there's no effect, one of two things has got to be true, as I said before, it's either that each and every household had no effect or that on average there's no effect. However, if I'm trying to establish --

BY MR. SHUSTER:

Q But just let me clarify. And by on average no effect, you mean it's theoretically possible that there may be an effect someplace --

A Yes.

Q -- but that necessarily means there are equally no effects other places, so --

A No benefits that --

Q -- no benefits -- such that the net average is no effect?

A Yes. So --

Q And you can't tell based on a regression who in the -- even if you say that it either means that there's no effect for anybody or there's no effect for some people and there is an effect for other people, you can't tell with your regressions who did experience an impact and who didn't **[Page 25]** experience an impact?

A That's correct.

Q And regression cannot be used for that purpose, is that your opinion?

A That's correct, not given the nature of the allegations here. And when I say that I really have to remind everyone that the essence of the allegations has really focused on the RSN and that intrinsically ties to tastes for sports programming at the household level. Some households are crazy for sports and some households aren't. Some households might have switched to the satellite providers if they could have offered the RSN, many households would not have gone anywhere. So, when you think about the mechanism through which the harm is alleged to

take place, you really have to figure out which were the households that really wanted and valued the sports programming so that they would have even considered to switch. And to be able to do that study and to identify impact, you have to be able to meter preferences at the household level, I just don't see any other way of doing it.

Now, you can use a regression to say on average in this county or at the franchise level, because the franchises in Philadelphia cluster, was there more harm than good or was there sort of a wash? And what I'm finding is that there was no impact, meaning that for whatever harm there might be **[Page 26]** there were countervailing benefits or the harm was so small that when you do this type of regression analysis, on average, you cannot detect any effect.

THE COURT: So then, Doctor, you have reached the conclusion that even through the use of the type of empirical studies that you did, using regression analysis, given the nature of the anticompetitive conduct that's alleged here and the nature of the markets, one could not reach any conclusions other than no antitrust impact?

THE WITNESS: That's correct.

BY MR. SHUSTER:

Q And let's talk about SportsNet foreclosure. So, plaintiffs are alleging that -- as you know, that because Comcast has declined to license SportsNet or lease SportsNet to the DBS providers that their penetration is lower on average across the cluster, right?

A That's right.

Q And we're not going to get into now your opinion on the quality of their work in coming to that

conclusion, but the point that you made a moment ago that there may be an average effect that can be found across the cluster doesn't tell you who would have wanted to switch and who wouldn't have?

A That's right.

Q And, as you say in your reports, that's important because of what, how Comcast would have responded?

[Page 27]

A That's right, that's exactly right. So, what we see, it's the evidence from the company documents, you can go to their Web site, you can read about this in the papers, the way that Comcast responds to competition from specific sectors, even the satellite companies, is by targeting the segment of their customer base that is at risk of going to a competitor. So, in the case of satellite, for example, Comcast has something called a Dish-Win-Back Program, they specifically track customers that they have lost to DBS. And for those customers, we have seen in the production in this record as well, what Comcast does is it figures out, how do we attract them back? And in some cases they offer them customized pricing --

THE COURT: Discounts?

THE WITNESS: -- discounts, and in many cases, either in addition to or instead of the price discount, they offer non-price offers. For example, a year of free high-definition television, some extra premium channels, things like that that are not monetized in the price responses that you see. But in any case, at the end of the day, it may well be that they offer customers who are at risk of switching some value through discounts or better services, but they do not engage in a uniform reduction in list prices, which is

exactly the mechanism you have to believe in order to give any credence to Dr. McClave's damage and impact model.

[Page 28]

THE COURT: Well, aren't there bundling incentives that one would have to take into consideration?

THE WITNESS: Sure.

THE COURT: If the plaintiff is right, RCN didn't have any local sports programming. Okay? So, there wouldn't be any bundle that they could compete with where Comcast's bundle did include local sports programs if there was no one else in the area that had that programming?

THE WITNESS: So, I --

THE COURT: I mean, it's a very -- I mean, it's -- I mean, your proposition seems to be that it doesn't make any difference whether or not there were people who are not in the market -- who, if they would have gotten into the market, would not have had the same type of programming as Comcast?

THE WITNESS: I don't mean to give you a bad impression, your Honor. I do think that if DBS had the RSN it might have attracted some more subscribers, I do, some from Comcast and some from others. But I do not think that in response to that additional competition from DBS, I do not think that Comcast would have responded by a uniform reduction in list prices, in fact I don't think there's any evidence that that competition would have caused Comcast to lower prices anywhere.

BY MR. SHUSTER:

Q Have plaintiffs done -- so, now that's one of their core **[Page 29]** propositions, that if DBS -- the satellite companies -- and, by the way, they don't allege, do they, that RCN did not have SportsNet, they only complain RCN had SportsNet under short-term agreements, right?

A That's right.

Q They don't allege it was without SportsNet?

A That's correct.

Q Okay. But coming to the satellite providers, now it's a core proposition for plaintiffs that if they had Philadelphia SportsNet Comcast's pricing would be lower across the board; have they done any empirical study on that point whatsoever?

A No, they have not.

Q I mean, it's their core proposition. So, what do they point to as evidence for that proposition? Do they have any evidence?

A Not to my knowledge.

Q Okay. What evidence is there out there in the literature, in the FCC studies, in the GAO studies, on that core point, whether increased satellite penetration results in lower cable prices?

A Well, it's an important question. There is evidence in the FCC and GAO reports, in a lot of the same reports that we've been looking at for different propositions, what the FCC and GAO -- so, for example, the GAO 2005 report or the FCC '09 Cable Price Report, what they look at is the effect **[Page 30]** of local-into-local on DBS penetration and cable pricing.

Q And let's be clear what local-into-local is.

A Local-into-local is the jargon in the satellite industry whereby the satellite companies carry the local broadcast channels and they carry them for distribution in the local markets only. Okay? So, then, for example --

Q I don't mean to interrupt you, but I just want to get this clear. Prior to the Satellite Home Improvement Viewers' Act of 1999, the satellite companies only could provide national broadcast networks, right?

A Yes, that's correct.

Q It was only from that day forward that they were able to provide local programming, which included local news, local talk shows and local sports, right?

A That's right, they --

Q So that's what we're talking about by local-into-local?

A That's right.

Q All local programming?

A That's right. In fact, this is why I think it's interesting and important to use this as some gauge or guide. The local broadcast channels carry local sports, they carry local talk, local news, a variety of -- also syndicated programming that is designed to appeal to local tastes. Now, what we know about the effect of local-into-local is that in areas where DBS carries the local broadcast signals it **[Page 31]** achieves higher penetration, that's what the FCC and GAO studies find. But what we also know from those same studies is that there's no effect of local-into-local on cable prices. So, DBS can achieve higher penetration rates, but cable does not compete in re-

sponse to that extra penetration by lowering the price; that's not to say they don't compete, they just don't compete by lowering price. And that's, in my view, the best evidence given that there's no other --

THE COURT: Doctor, I'm going to --

THE WITNESS: -- specific --

THE COURT: -- come back to the same mantra. Okay? If there wasn't anyone in the market that could match the programming package that Comcast had at any given point in time, then doesn't that -- or doesn't that result in Comcast having more control over the prices than it ordinarily would have if it were otherwise?

THE WITNESS: So, as a general proposition, I would have to say yes. Okay?

THE COURT: Well --

THE WITNESS: That if there's no one --

THE COURT: -- it's a general proposition -- it's a general proposition, and you've said yes to that general proposition, because there are legions and legions of illustrations and studies and papers that employ that as a basic premise?

[Page 32]

THE WITNESS: I'm sorry, I don't know what you're -- what is the that?

THE COURT: The that is that if a vendor in a market -- if there isn't anyone in the market that can match the product and programming, programming in the case of this market, that Comcast had, nobody in the market can match that, then Comcast has more control over its price?

THE WITNESS: But, your Honor, in this --

THE COURT: Your answer is yes to that?

THE WITNESS: My answer is yes if you believe the predicate that no one else can match. Okay?

THE COURT: I understand.

THE WITNESS: But in this case --

THE COURT: I understand.

THE WITNESS: -- the viewers in this area can receive and can watch a lot of the games of the Phillies, the Flyers, the 76ers -- and of course the Eagles are off the table -- and DirecTV has its own exclusive programming for football, but in the case of the other three leagues the viewers in this area can watch even without Comcast a lot of the regular-season games and --

THE COURT: But not all of them?

THE WITNESS: But not all of them, certainly not all of them, and all of the post-season games. So, you know, really it boils down to what is the incremental effect of **[Page 33]** that -- that -- the ability to control those extra regular-season games, and what I am seeing in the data and what the other supporting evidence is showing is that this effect doesn't appear to be great enough so as to cause Comcast to uniformly raise or, in the but-for world, lower prices in any noticeable fashion.

BY MR. SHUSTER:

Q And when the Court says there are legions and legions of studies, is there any study, any, that shows that if a DBS provider has incremental additional sports programming in any market, any market, that it has an effect on cable prices?

A No, there is no such study at all.

Q And the study that you say is most closely analogous is the GAO study that evaluated the impact of the satellite providers having local-into-local?

A That's right.

Q And that study affirmatively finds there is no effect on cable prices?

A Well, I'm sorry, the FCC study -- the GAO study finds no effect, the FCC study, the 2009 Cable Price Report, finds a positive and significant effect of local-into-local. I mean, satellites carry their local channels on cable prices. That's not to say that cable walks away and says, we're not competing, we're going to raise price, no. Instead what's really happening is that cable is responding, presumably, if **[Page 34]** you read the other portions of the report, the way cable competes with satellite is to offer bigger and better services.

THE COURT: Maybe today, but maybe not tomorrow.

THE WITNESS: I -- I -- I -- I can't -- I don't --

BY MR. SHUSTER:

Q By the way, when you're saying --

THE COURT: Because what we're talking about is power to control prices --

THE WITNESS: That's right.

THE COURT: -- that's what we're talking about?

THE WITNESS: That's right, but --

THE COURT: What you're talking about is actual control of pricing --

THE WITNESS: That's -- that's --

THE COURT: -- but you say your studies show that it wasn't that kind of control in the market?

THE WITNESS: That's right. But, your Honor, if I look forward, the best I can do is to look at sort of the dynamic trends, especially in the Philadelphia area, and what I see is the spread of FiOS at a very rapid pace. In fact, in my April 10th merits report I show you a map of the footprint of where FiOS is today and where FiOS has been approved and is already planning to launch, and it appears in the next few years going forward FiOS is actually going to **[Page 35]** cover over 50 percent of the same territory that Comcast covers.

THE COURT: I don't have to question that part of your report in any way, shape or form to decide the issue that's before me, and I'm not so sure that the economists that have testified and those that are now testifying or will testify really understand that I don't have to make a decision on the merits.

THE WITNESS: No, I understand. I was just responding to your question about what about the future and all I can tell you about the future is it looks like it's going to be more competitive than it was in the past.

THE COURT: And why is that?

THE WITNESS: Because of FiOS.

BY MR. SHUSTER:

Q But coming back -- I just want to --

THE COURT: That's because there's more of a presence in the marketplace of other competitive entities?

THE WITNESS: That's right.

BY MR. SHUSTER:

Q But just come back to --

THE COURT: And that's where we start --

THE WITNESS: That's right.

THE COURT: -- economically with our approach to this problem?

[Page 36]

THE WITNESS: That's right.

BY MR. SHUSTER:

Q I just want to come back, you said that the 2009 FCC report found a positive and significant effect of local-into-local on cable prices; you mean that the FCC found that the satellite providers providing local programming caused -- actually causes cable prices to go up, not down?

A That's right.

Q All right. Let's move on to -- well, and just to address the Court's last question, and then I want to move on quickly to Dr. McClave, but just to address the Court's last question, you're not saying -- you're not suggesting the Court should make a ruling on the merits, you're saying you don't think there's any economic evidence that plaintiffs or their experts have pointed to that could be used by the class to show impact?

A That's exactly right.

Q All right. Let's flip to the McClave charts, to your charts that address Dr. McClave. And we're going to have to go through these very quickly, but I want to flip to D.

MR. GOLDBERG: I'm sorry?

MR. SHUSTER: D.

MR. GOLDBERG: Thank you.

THE COURT: I just want to -- I do want to make sure that I understand these demonstratives --

[Page 37]

MR. SHUSTER: Oh, good.

THE COURT: -- the Doctor went through and the demonstratives I do find helpful from time to time.

MR. SHUSTER: Okay.

THE COURT: So, just let me look at B-1 --

MR. SHUSTER: Okay. Please, your Honor --

THE COURT: -- and see if I understand it.

MR. SHUSTER: -- absolutely.

THE COURT: B-1, yes, okay. C – we're at C now?

MR. SHUSTER: Yes. Well, what B and B-1 do is they reflect the results of Dr. Chipty's empirical work on -- here on whether there's any relationship -- whether clustering deters overbuilding. So that's what B and B-1 do is they address those points and they point your Honor to the studies, the exhibits in her reports where she addresses all of plaintiffs' criticisms of her work and comes up with the same results; C is a conceptual point.

BY MR. SHUSTER:

Q D, Dr. Chipty, please describe.

A Sure. So, C and D are related. C sort of sets the framework for what Dr. McClave's screens are in constructing his benchmark sample. Now, he explained very carefully that he's got two main screens, the one is a DMA-wide DBS screen where he drops

all areas with DBS penetration as below Comcast's national median, and then he also uses a Comcast **[Page 38]** county-level share screen where he drops all Comcast counties where Comcast counties where Comcast's share is over 40 percent.

So, what -- and the motivation, the rationale for his screens is that they're supposed to identify competitive areas and I have -- I have all sorts of conceptual issues with that because, as we have already talked about a couple of weeks ago, the Philadelphia clusters didn't look like any of those markets in Dr. McClave's benchmark sample on the basis of Comcast's share or DBS penetration levels, even prior to the transactions at issue. But in Slide D I'm making a slightly different point and that is that, if you even believe that that's what his screens are doing and even if you accept that that's appropriate, which I say it's not, what you see is that as a result of his here DBS screen you get entire DMAs going in and out of his sample for no apparent reason. So, for example, you can look at the Flint-Saginaw base city DMA in Michigan, what you see is that it's out in 2004, out in 2005, in 2006 and out and out again. If you actually look at what's happening in Flint, Michigan, nothing structurally is changing. His screen is actually not picking up anything about changing competitive conditions, it just so happens that the DMA goes in and out because it's hovering around the DMA screen. If you see a blank like you see in Column 2003 for Flint, that means that Comcast didn't **[Page 39]** have any operations in that DMA in that year. So, if there's an in or out, it means Comcast did have a presence there, and the in or out tells you the consequence of Dr. McClave's screen.

Now, I picked out a handful of examples here, these are not the exception. In fact, there are about 30 -- about 30 percent of the DMAs in Dr. McClave's sample go in and out as an artifact of his DBS screen for reasons that have nothing to do with changing market conditions.

Q What do you mean by an artifact?

A It's an artifact, it's basically sort of a -- it has to be that way given how he has implemented his screen. It's not actually picking up some true, underlying competitive environment that would give him some motivation for looking at that area.

Q And these ins and outs, this is not you putting these things in and out, this is in his -- based on his screens --

A That's correct.

Q -- he will take one year, he'll take '04 and '05 for Flint-Saginaw, but not '06, then he comes back to '07 and '08 and includes it, but you're saying the actual competitive circumstances haven't changed --

A That's right.

Q -- there's just been slight changes in the percentages that may cause it to go in and out?

[Page 40]

A That's right. For example, if you look at the first row here, Bluefield-Beckley-Oak Hill, I actually looked at each of these examples in much more detail, it was in in the first two years and it was out in the other three. So, I actually went to look to say, well, what happened? Did the number of cable operators change noticeably? Did we swap out small guys

for big guys? And it turns out there's nothing remarkable in the mix of cable operators serving this area, it just so happens that Bluefield-Beckley-Oak Hill is hovering around the threshold and, as a result of that, it gives the appearance that in fact it should not be in the sample in the later years.

Q Let's go to E.

A Sure. E is the same type of window into Dr. McClave's Comcast shares screen. Here, what I'm showing you are Dr. McClave's Comcast share numbers, these are his numbers that I pulled out of his backup. What he does, for example, if you look at Fulton, Atlanta, the county of Fulton and the DMA of Atlanta, he sees that Comcast's share in Fulton was 23 percent in 2003, it's below the 40-percent mark, so he includes it in the sample. The next three years the county fails his share screen and the next two years it passes again. And if you look at these numbers you see that -- you could look -- for example, look at Atlanta, Walton, it's in in 2003, it's out in 2004, it's in 2005, it's out in 2006, **[Page 41]** and then it's in for the next two years, for no rhyme or reason. And then I would point you to some of these numbers, it jumps. There's absolutely no rhyme or reason for why these numbers jump like this. If you look at Colusa-Sacramento, Dr. McClave actually has Colusa's share going from 21 percent in 2004 to 106 percent in 2005. I looked at Colusa, there is nothing changing dramatically in Colusa in Comcast's presence there.

So, I would suggest two things from this. The first is that his share screen, which he says is designed to find competitive areas, is really not doing that, I don't really know what it's doing. So, I can't really tell you what it's doing, I can just tell you what

it's not doing. And the second thing is some of these numbers -- and these are just a selection, there are many other crazy numbers in the backup here. I don't really think that his screens are legitimately picking out areas that have any rhyme or reason even to what his intended purpose was, which I question in the first instance.

Q Let's look at F.

A Sure. F is a summary, it's sort of cutting it -- cutting the same issue in yet a different way. Comcast -- what this slide summarizes is that Comcast over the time period 2003 to 2008 had a presence in 90 DMAs outside of Philadelphia and what the table summarizes is how the collective sort of **[Page 42]** implementation of the two screens influences what's in the benchmark and what's out. Okay? So, over half of the DMAs are completely excluded and, of those, the large majority are excluded even though DBS had access to the RSNs in those DMAs. So, there's no --

Q So, even though the satellite companies had access to the local SportsNet, like Philly SportsNet, he excludes these DMAs because their penetration is too low?

A That's exactly right. So, what that means as a practical matter is he doesn't allow for DBS penetration to be below the average -- the median actually, not the average, the median, for any legitimate reason whatsoever, because he has screened out areas that have low DBS penetration even though, by plaintiffs' theory, they had access to the same set of programs.

Q I understand. All right. Well, let me just -- just to close the loop on that, if you're not -- if Dr.

McClave isn't taking into account, if he's not including in his data set counties where the satellite providers have the local SportsNet, then how can we assess, going to the Court's earlier point, whether there's power over prices in those markets or in markets where Comcast does or doesn't have the SportsNet? How can you assess it if he drops those from his --

A I don't think you can, which is why what I said and what **[Page 43]** I say again is that, whatever Dr. McClave estimated this gap between actual and his but-for prices, this is not monopoly overcharge associated with the allegations, it can't be by the design of his sample. He has excluded the possibility that you could have a low penetration, even if you had -- and, therefore, no particular effect on prices, even though you had access to the exact same programming bundles.

Q All right. I want to quickly go to G.

MR. SHUSTER: And I just want to tell the Court, G just provides -- we've been talking a lot about population density and how different --

BY MR. SHUSTER:

Q -- why don't you tell the Court quickly?

A Sure.

Q Okay?

A Sure. So, this -- but before I leave Slide F --

Q Okay.

A -- the last part of F also shows you that, even in the DMAs that Dr. McClave has included in his sample, he has dropped -- in the vast majority of

those cases, he has dropped the most densely populated counties. And the Slide G is --

THE COURT: Have you put them in to see whether or not it made any significant difference?

THE WITNESS: I have, your Honor, and I --

[Page 44]

THE COURT: And did it make any significant difference?

THE WITNESS: Yes, it did.

So, we can now look at Slide G, which is the related point. This just shows you systematically how the counties in the Philadelphia area compare to the counties in Dr. McClave's benchmark areas. And what you see is really not just on population density, but in lots of different ways, the counties in Philadelphia are different from the counties in Dr. McClave's benchmark sample. And I pointed out population density because it happens to be one that each and every study that looked at the determinate of cable pricing looked at. And it doesn't have to be this measure of population density, there are many other measures of population density, but in spirit or in principle studies of cable price determinates recognize that you must control for something like population density. And of course Dr. McClave's sample is extremely different on this measure from the target counties in Philadelphia and yet he doesn't control for that difference.

BY MR. SHUSTER:

Q And that alone, controlling for that difference, amounts to -- if you control for population density, what does that do to his estimate?

A So, I don't have the number off the tip, but in one of my **[Page 45]** reports, in my May 11th report, I showed you the incremental effect of this change and its quite noticeable, its hundreds of millions of dollars --

Q Okay.

A -- from the one change alone.

Q Now, H is your chart where you say why you say that controlling for population density is standard practice?

A Yes, it is standard practice. But Dr. McClave says that he -- and I think Dr. McClave recognizes that other studies have included it, but he chose not to include it because, when he put it in, he got a sign that he didn't expect. Now, I'm not really sure what he expected, but I can tell you that the effect of population density in a reduced-form regression model can be either positive or negative, there are effects that push prices both ways. What Dr. McClave said is that look in denser areas, it's well known -- it happens to be true -- it's well known that cable operations can be more efficient, so that puts downward pressure on prices. But, at the same time, what I have shown and what others have shown is that in more densely populated areas cable operators roll out bigger and better services, that first -- they do it first and they do it the most, and that puts upward pressure on prices. And further, in those areas, consumers are willing to pay for those bigger and better packages.

So, I don't really have an a priori expectation. **[Page 46]** The sign that the coefficients will pay will depend on two things: One, the sample variation and, two, what other variables are you controlling

for. You can't just pick coefficients across regressions, across specifications, across samples, and expect there to be identical signage on each and every one of those without actually thinking about what is the regression model picking up. And so --

Q By the way, in your merits report, Exhibit 22, it identifies the services that are available in Philadelphia versus elsewhere in the country, right?

A That's right.

Q Okay. Now, let's look at I.

A Right. I prepared this demonstrative because in Dr. McClave's direct testimony he presented for the first time a new piece of information, he suggested that in fact he has been thinking about what everyone is saying about his benchmarks being more rural than urban. And so he investigated and he reported finding that in fact a vast majority of subscribers in his benchmark sample live in counties that are more urban than rural. So, I looked at that very carefully and put -- and this Chart I and the next Chart J is intended to speak to that, but before I go into that I have to say that what Dr. McClave now describes as a benchmark sample that's relatively urban is at odds with what he has said before the hearing two weeks ago. In his written **[Page 47]** testimony, Dr. McClave has said that the benchmark sample is so different from the Philadelphia counties that it would be irresponsible to try to put in a regressor to try to adjust for that difference, because that would be tantamount to what he describes as an out-of-sample extrapolation. What that means is that under no circumstance can you use this set in the benchmark and the distribution of urbanicity that it embodies to learn anything about the effect of urbanicity in this sample, the Philadelphia sample, be-

cause Philadelphia, he said, is so much more urban that you can't learn anything, and yet last week or a couple of weeks ago he said in fact his benchmark sample is quite urban.

So, I found that really odd, and so I went back to look very carefully. And what the first slide says is it shows you how misleading the description that he had was. I continue to believe that his benchmark sample is pretty nonurban. The first line of this chart tells you what the minimum percent urban is in the Philadelphia counties. The most rural counties in --

Q In each county you're talking about?

A Yes, in each county. The most rural county in Philadelphia had an urbanicity measure of 58 percent, that is 58 percent of people lived in areas that were more urban than rural. There are only 32 percent of benchmark counties in Dr. McClave's sample that have urbanicity measures above the **[Page 48]** minimum in Philadelphia. The median urbanicity in Philadelphia is 89 percent, only seven percent of Dr. McClave's benchmark counties have urbanicity above the median in Philadelphia. And then of course the County of Philadelphia has urbanicity of 100 percent and there is nothing remotely similar to that in the benchmark counties that Dr. McClave uses.

Q Let's go to K.

A And -- sure.

Q Chart K, skipping ahead a couple.

A So, what I did is to ask, well, if you were going to use Comcast's footprint to identify areas that were more comparable than not to Philadelphia on population density, especially if you're going to insist

on not controlling for population density in your regression, what DMAs, what areas would you want to have in your regression model? So, what I did is I ranked DMAs based on population density and these are the top ten Comcast DMAs based on population density. Comcast has a presence in each of these ten areas. And I show you in the middle column marked, "In McClave's Benchmark Sample," whether or not Dr. McClave included any Comcast operations in those areas in his benchmark analysis and, with the exception of Atlanta and Denver, he does not. And for Atlanta and Denver, if you look further, he does not include the most densely populated county in each of those DMAs.

[Page 49]

And so I wanted to sort of drive this point a little bit further and that's what the next several slides do.

Q So, let's go.

A So, I will illustrate for you just two types of examples, the one is the Minneapolis type and the one is the Denver type. Minneapolis is a type that he excluded in its entirety because of his DBS screen, but I actually think that if he had not it might have given us something that was remotely comparable, especially if you don't control for population density. The map on Slide M shows you the Minneapolis-St. Paul DMA, that's the gray-shaded area. The blue, the light blue and the dark blue are the areas in which Comcast has a presence, and you can see that the darkest portions of that where population density in the county is above a thousand are the Twin Cities, St. Paul and Minneapolis. And these two counties might have been appropriate to include, but in fact Dr. McClave excludes the entire set of Comcast operations in Minneapolis because of DBS screen.

And, by the way, there's nothing peculiar going on with Minneapolis' DBS penetration, it hovers in the mid-20s.

If you look at the next slide, this shows you Denver. So, Denver is a DMA in Dr. McClave's analysis and the -- and Slide N shows you where Comcast operations live in the DMA. Slide O just focuses in on these areas --

Q Well, yes, let's do that, because what Dr. McClave does **[Page 50]** is he takes out metropolitan Denver and he only includes these enormously rural counties, right?

A That's right, that's right. So, Slide O shows you where Comcast has a presence, but the next slide, P shows you what Dr. McClave drops and what he keeps because of his share screen. So, the red areas are areas that he drops, and notice he drops the county that has the City of Denver and the other very densely populated counties in the -- where Comcast has a presence in the Denver DMA, and he keeps the four counties. Now, these four counties, I actually -- I went back to check, because it was my hunch that these counties were in the Colorado Rockies, and I went back and checked and in fact they are. It's like Hugh describes exactly what's contained in these counties. These counties are not urban, they're very rich; these are places where people have second homes or places where people retire, and yet these are the counties that Dr. McClave uses to compare.

Now, Dr. McClave suggested that I have somehow given you a handful of examples without establishing a systematic pattern. I don't think that's what I've done, but just to make sure that you see that's not what I've done, I've created Chart R. What

Chart R shows you is the entire distribution of Comcast counties by population density. So, Comcast operates in areas where population density is very low, less than 50, so the X axis is running through the **[Page 51]** different levels of population density, all the way to areas where population density is greater than 10,000. And what the blue and the mustard colors show you are the counties that Dr. McClave has excluded and the counties that he has included as a result of his screening. And then the numbers above the bars show you where the Philadelphia counties live. And the relevant range of the Philadelphia counties occurs well after the bulk of the benchmark sample is exhausted and there is very little representation in Dr. McClave's benchmark sample for any county in Philadelphia with population density over 400.

So, this is a systematic pattern. I have not cherry-picked the handful of examples, it is what it is.

Q Okay. Let's talk about prices quickly, the prices you used and those he used, let's look at --

A Sure. The other big area --

Q -- S.

A -- of -- of disagreement and, quite frankly, concern that I had with what Dr. McClave has done is that he uses list prices, ignores discounts and in fact claims a number of different things about discounting. He says that, well, there isn't much discounting. Well, if there wasn't much discounting, then use the actual prices and let the data speak. He also says that the discounting only happens sporadically; well, that's just not true. Discounts last **[Page 52]** anywhere from six months to 16 months and at

any point in time there are lots of customers on discounted prices.

And then, finally, I have actually used the actual prices paid by consumers and I can see that it matters. And so what Chart S is showing you is an example that has been floated around in all of the reports back and forth, it shows you explicitly what's happening in one area of the Philadelphia cluster in what's known as the grouping of franchises that Comcast puts under the title, "Southern New Jersey." This is from July, 2008. The full height of the bars ending with the blue are the list prices that Dr. McClave uses, these data were taken from Dr. McClave's backup. The red bars show you the average prices, the actual price experience of customers in each of the franchises shown by the bars. And you can see that average prices are different from actual -- excuse me, actual prices are different from list prices, this just happens to be the fact.

Q So, by using list prices, he's using an overestimata -- systematically using an overestimation of prices?

A That's right, that's right. And in fact, if there's more discounting in Philadelphia than outside of Philadelphia, an analysis of list price is not going to give you any indication of the so-called overcharge that --

THE COURT: And what's he comparing that to?

THE WITNESS: He compares list prices in **[Page 53]** Philadelphia to list prices, predictive list prices --

THE COURT: Benchmark?

THE WITNESS: -- based on his benchmark, there's no factoring in of discounts in that analysis.

BY MR. SHUSTER:

Q On either side --

A On either side --

Q -- of the equation.

A -- of the equation.

Q Let's go to T.

A Yes, T actually gives you some more insight into the southern New Jersey --

THE COURT: Before you leave that --

THE WITNESS: Yes.

THE COURT: -- that results in a percentage?

THE WITNESS: Dr. McClave's analysis, yes.

THE COURT: Now, is that percentage, is there going to be a difference percentage-wise in comparing list to list, as opposed to actual to actual?

THE WITNESS: Yes.

THE COURT: There is?

THE WITNESS: Yes.

THE COURT: Is that difference going to be -- a percentage difference going to be significant?

THE WITNESS: I have done that calculation and I **[Page 54]** have found that it is.

THE COURT: Is that in any of your reports?

THE WITNESS: Yes, it is.

THE COURT: I want to know what report that's in. You can let me know.

MR. SHUSTER: We'll have to get that for you, your Honor.

THE WITNESS: That's in my May 6th report, Exhibits 5 and 6.

THE COURT: Okay.

MR. SHUSTER: There you go.

THE WITNESS: So, what this -- and actually the punch line from that analysis that I did is in these demonstratives, so I'll point you to that as well. What Slide T shows you is just a little more information, because you can't really understand what's driving the difference across our two methodologies unless you really understand the data. What this shows you is a distribution of prices for B-1 on the left panel and B-2 on the right panel. And what you see is that the most common B-1 price is $9.85 --

BY MR. SHUSTER:

Q By that you mean the price, the highest number of subscribers in that area are paying --

A In that year.

Q -- is the price that's reflected in the first column?

[Page 55]

A That's right, the first bar --

Q Right.

Q -- is $9.85. We have over 60,000 subscribers taking a B-1 package that costs $9.85. And you see that we have the same approximately 60,000 subscribers taking a price of $23.15 in the B-2 package. If you add those two prices up, 9.85 and 23.15, what

you get is $33, if I have done my adding right, and that $33 is the Triple Play price.

THE COURT: Is the what, the Triple Play price?

THE WITNESS: Is the Triple Play price, yes, sir.

BY MR. SHUSTER:

Q So that's a discounted bundle price for cable, phone and Internet by -- and that happens to be the price the highest number of subscribers in this area are paying?

A That's right.

Q And Dr. McClave doesn't capture any of that, because he's just looking at list cable prices in the area?

A That's right. Dr. McClave would not use this price because when he goes to this area he finds that prices in this area fell by a lot over time, and so he would not admit that as a legitimate price. Instead, he uses the higher prices, which are the list prices, and he ignores the entire price --

THE COURT: Yeah, but, I mean, he says he's looking for a relationship. He's calculating damages, he's looking **[Page 56]** for a relationship and --

MR. SHUSTER: He's --

THE COURT: -- go ahead.

MR. SHUSTER: I'm sorry, no, forgive me, your Honor.

THE COURT: And that relationship was reflected in a percentage by comparing list prices?

THE WITNESS: Yes, sir. So, in order to ignore these discounts, you have got to believe that there is exactly the same level of discounting happening eve-

rywhere, that's just not true. I guess -- I can look and I have looked --

THE COURT: Isn't he saying --

THE WITNESS: -- there's more discounting --

THE COURT: -- isn't he saying that that percentage, that relationship percentage that he struck, that prices were inflated -- prices would have been lower by that percentage --

THE WITNESS: That's right, list prices.

THE COURT: Well, no, he's saying prices across the board. He's not just saying list prices, his testimony was prices across the board. So that you take discount prices, if you wanted to account for the difference between discount prices and list prices, with respect to antitrust damages, you could account for it by using the percentage?

THE WITNESS: But, your Honor, his percentage is **[Page 57]** really off an examination of list-price overstatement, but that's not what people pay. If you paid something off of list, if you paid a -- if you had a discounted price -- by the way, Comcast doesn't offer a percentage discount off of list, Comcast would offer you a particular price. You pay a particular price and I pay a particular price. If we ignore your discounting in comparing your prices to mine, we'll find maybe that you're paying a higher price than I am paying, but actually you're not, you're paying a lower price. It may be that you're paying a discounted price.

Now, Dr. McClave says, well, I ignore the discounts when I calculate the percentage overcharge, but then I bring the discounts back in when he -- and he does -- when he calculates the revenues.

THE COURT: The damages? Yes.

THE WITNESS: Right. So, he takes the list price overcharge and he applies it to revenues calculated as average prices --

THE COURT: And those revenues represent the discount, the actual prices?

THE WITNESS: But the overcharge calculation that he applies to those discounted revenues overstates the overcharge if there is more discounting in Philadelphia than outside of Philadelphia.

MR. SHUSTER: Which he hasn't -- which he can't say, **[Page 58]** because he doesn't know.

THE WITNESS: Well, he knows, it's in the data, it's available to -- there are -- Dr. McClave has calculated average prices, he has. He has calculated list prices, you can just look, there's more discounting in Philadelphia. So, it's nonsensical to apply a list-price overcharge to actual revenues when you know that in fact when, in the but-for world, had Comcast charged a different list price, it would have also changed its discounting pattern, it would have changed -- the company would have changed the actual prices it receives or charges its customers, it would -- it doesn't matter how it gets there between the combination of its list price and its discount, what matters from the point of view of -- for the profitability of the company and from the point of view of consumer harm is the pricing that consumers actually pay.

Now, if you think this makes no difference, you would think that if you re-run this model using actual prices instead of list prices, you should come up with approximately the same answer, and in fact you don't, and I have done that and --

BY MR. SHUSTER:

Q Okay. But, before we get to that, there's one point I want to clarify. Plaintiffs are not only relying on Dr. McClave's model for calculating damages, they're relying on **[Page 59]** it for impact --

A That's right.

Q -- right?

A That's right.

Q So, if he is finding -- if he is ignoring actual prices, he may be finding impact where there is none?

A That's right, that's right. In fact, I believe that their evidence for impact is the fact that in Dr. McClave's modeling he finds positive damages in every county in every year, ergo impact, common impact across the class, across the class period. And I guess what I'm saying is that that is an artifact of his use of list prices. So, what I did in this May 6th report is I used exactly his specifications and, instead of list prices, I used average prices --

Q Average actual?

A Average actual, the actual prices consumers pay. And I want to clarify, there's been a lot of back and forth between Dr. McClave and myself on appropriate calculation of averages, but the purposes of this demonstration, I have used his algorithm. There are no zero prices being used, there is no distraction here from the main issue that if you make this one change, go from list prices to actual prices paid and, oh, by the way, I put in population density, because you just must, if you make these two changes, what you find is that in fact his model produces negative damages in many counties in **[Page 60]** many years

and my slide view, which mirrors an exhibit in my next report, summarizes exactly where that happened and how frequently that happened.

Q And negative damages for impact purposes means no impact?

A That's right -- or benefit --

Q Or benefit?

A -- but, yes, sure, from the legal perspective --

Q So, all these places where there are minuses, if you're correct that average prices have to be used, then all these places where there are minuses means that people are not paying higher prices?

A That's right.

Q And there has been no demonstration of impact?

A That's right, that's absolutely right. In fact, I point you to the Philadelphia County. In Philadelphia, this is an area where plaintiffs allege there would have been more overbuilding. And so, in Philadelphia, they're calculating additional harm from the loss of that additional overbuild competition. This calculation includes that overbuilder harm, as the plaintiffs would like to include, and even allow for overbuilder damages in Philadelphia, once you use actual prices and include population density and make no other change --

THE COURT: Negative?

THE WITNESS: -- negative, every year throughout the **[Page 61]** questioned --

BY MR. SHUSTER:

Q Okay. Let's --

THE COURT: Mr. Shuster, have you pretty much highlighted those things that you wanted to highlight?

MR. SHUSTER: With one -- I have one last chart, two minutes.

THE COURT: Go ahead.

MR. SHUSTER: Thank you, your Honor, so much.

BY MR. SHUSTER:

Q Its Chart V.

A Yes.

Q This is where you ran --

THE COURT: Chart D, as in David?

MR. SHUSTER: V, as in Victor.

THE COURT: V? Oh, yes, V, I have it.

MR. SHUSTER: Okay.

BY MR. SHUSTER:

Q And this is the chart where you explained succinctly what you did here and why it's important to run this kind of a test?

A Sure. What I did here is I ran Dr. McClave's model on B-1 prices only, that's the short from. What Dr. McClave does is he builds a model to study the determinate of expanded basic prices, that's D-1 plus D-2 prices. And I ran this **[Page 62]** here not because I believe this is an appropriate model for B-1, but I ran the model here as what we call a falsification test. And I've been trying to think about how best to explain this in plain English and here's what I came up with: So, imagine that you built a metal-

detector and you want to find coins and jewelry on the beach, you build them -- somebody -- you go to someone to design your metal detector, they build you a metal detector, you run it over coins and, lo and behold, it beeps. Now, you might wonder, hmm, what if I ran this thing over feathers and seashells, what would it do? Well, presumably, the test of a good model is that it points out a problem when there is one, it detects what it's supposed to detect, and it doesn't give you alarms when in fact it shouldn't, if the machine is really doing what you think it's doing. So, you run your metal detector over the seashells and it better not ring. That's not to say that you wouldn't have built a different model or machine if you were looking for seashells. Okay? So, what I did here is I ran Dr. McClave's model and B-1 prices. B-1 prices are regulated prices, your Honor, there is no allegation here that the regulators in the Philadelphia area somehow conspired and charged customers more prices than regulated elsewhere. And so when -- so, I would have expected that whatever I would have found -- I wasn't sure what I would find, but whatever I would have found, I wouldn't find **[Page 63]** significant damages, because there wouldn't be any.

By the way, you can run the same exercise with my models and they will pass the test. Okay? I do not find damages, I do not find anything noticeably different with the B-1 prices. But here Dr. McClave finds $875 million in damages with his model, but the same model picks up nearly 675 million in damages on B-1 only. Now, last week or a week or two ago Dr. McClave said, well, that's not my model, I wouldn't have run this model if I were modeling B-1 prices, I would have included other stuff. And he

wasn't sure what that would be, but he knew it wouldn't be the same as this.

Now, I go back to my metal-detector analogy, your Honor. If you went back to your metal-detector designer and said, hey, I ran this over seashells and it went off, and your metal detector guy said, well, don't run it over seashells, I didn't build it to go over seashells, that wouldn't give you much comfort, I'm guessing. I'm guessing you would still be suspicious of its ability to detect --

THE COURT: Tell me about the R-2 factor.

THE WITNESS: I'm sorry?

THE COURT: Tell me about the R-2 factor.

BY MR. SHUSTER:

Q The R-squared, R-squared.

THE COURT: R-squared factor.

THE WITNESS: Oh, the R-squared factor? Oh, **[Page 64]** absolutely.

So, the R-squared -- and I don't remember the exact number sitting here right now, but it --

THE COURT: I think it's 47 percent or something --

MR. SHUSTER: That's right, it is.

THE COURT: -- is that right?

THE WITNESS: -- Dr. McClave's number is 47 percent --

MR. SHUSTER: Yes, your Honor.

THE WITNESS: -- but I guess I don't remember what number I get with the B-1 only model, but it's in my report. But, nonetheless, Dr. McClave gets an

R-squared of 47 percent. It turns out, if you look -- now, when I present results, I show you piecemeal how I add on variables -- if you add on variables to Dr. McClave's model, just slowly, putting just a constant -- putting just what --

THE COURT: But I just want to know about the acceptability within your field of exercises that result in R-squared.

THE WITNESS: So -- so --

THE COURT: What about the acceptability?

THE WITNESS: Yes, sure. So, I would like to give you two parts to answer that. The first is that, as a general matter, in R-squared it's something like 0.4 to 0.5 is acceptable if what you're doing is interpreting the **[Page 65]** coefficients that you have estimated. In a cross-sectional regression of the type that Dr. McClave and I are both using, though there's some time element, a lot of it is cross-sectional, that is an acceptable level. However, it's not an acceptable level or a comforting level if what you're doing is trying to interpret the gap between an actual price and a predicted price. And the reason I point that out to you is that whatever you don't explain is in the gap. So, if your model has failed to control for important factors, that's going to be in the gap and, if everything in the gap is by your theory part of the allegations associated with the behavior and the conduct, then you have to be very careful at what you --

THE COURT: Now, other than your opinion, and I don't mean to demean that in any respect as valuable and we have accepted it as an expert opinion, what's your best authority on that? You said that an R-2 factor, an R-squared factor, is not acceptable

when what you're measuring is the difference in price.

THE WITNESS: No, I guess what I'm saying, that you have to be much more careful --

THE COURT: Oh, I understood you to --

THE WITNESS: -- when you're doing the gap --

THE COURT: -- I understood you to say it was not acceptable.

[Page 66]

THE WITNESS: No, I'm sorry, let me -- I'm saying that, traditionally, a 0.47, I wouldn't pause. Okay? Traditionally. But in this case you have to pause. That's a pretty significant count not being explained. Okay? That's half not being explained. And so in that case you have to be very careful and ask yourself, what else is going on? Have I missed something that could explain legitimate differences in price? And in this case where you can point to such factors, it is -- that gap is not acceptable. So, this is my opinion and the authority of it is really standard practice in econometrics.

THE COURT: Where would I find that?

THE WITNESS: Oh, for example, in the reference manual on regression analysis put out by Dan Rubenfeld, he talks a lot about the importance of controlling for things that really matter, he does.

THE COURT: Thank you.

BY MR. SHUSTER:

Q And that manual is referred to and cited as a source by Dr. McClave?

COUNSEL: It's Exhibit 1 in the case.

THE WITNESS: And by myself.

MR. SHUSTER: All right.

THE COURT: Yes, it was in --

THE WITNESS: But I wanted to point out one other **[Page 67]** thing about this R-squared and 0.47, the bulk of that R-squared, that 0.41 percentage points of the 0.47, to the vast majority of the 0.47, is driven by just the constant and the year-to-year dummies that Dr. McClave had in his sample. That means that his two extra variables, the income variable and the channel-capacity variable, and all of his overbuilder variables, three extra variables on top of the constant and the year dummies, are only contributing 0.6 into that R-squared.

BY MR. SHUSTER:

Q 0.6?

THE COURT: 0.6?

THE WITNESS: 0.6 into that R-squared.

THE COURT: Anything else, Mr. Shuster?

MR. SHUSTER: Your Honor, thank you --

THE COURT: Thank you. We're going to take a ten-minute recess and then well proceed with the cross-examination.

(Court in recess; 10:59 to 11:18 o'clock a.m.)

THE COURT: Thank you. You may be seated. You may proceed, Counsel.

MR. SHUSTER: Your Honor, I forgot to move in Defendant's 71, the Chipty demonstratives.

THE COURT: They're admitted.

[Page 68]

(Defendant's Exhibit 71 received in evidence.)

MR. SHUSTER: Thank you, your Honor.

Thanks, Mr. Goldberg.

THE COURT: Mr. Goldberg.

CROSS-EXAMINATION

BY MR. GOLDBERG:

Q Good morning, Dr. Chipty. I'm Joe Goldberg, we've met before.

A Good morning.

Q I'm going to start out, I was interested in a conversation you had with Judge Padova during the direct examination when Judge Padova asked you whether a firm like Comcast had some market power, had some power over prices in the market. Do you remember that conversation you had with Judge Padova?

A Yes, I do.

Q And I want to make sure I got it down. You agree with Judge Padova that a firm like Comcast can exercise market power?

A Yes.

Q Has power over prices.

A Yes. Yes, loosely speaking I agree with that.

Q Sure. Well, you're -- I'm not an economist, I'll admit that at the beginning so if I use loose language I apologize in advance. In the course of your testimony you also would **[Page 69]** agree that one of the basic tenets of economics is that in a real com-

petitive market the way firms compete is through price?

A It's one of the ways firms compete.

Q But it is in fact among dedicated economists it is what dedicated economists look to in a competitive market to see whether firms are competing, recognizing that there may be other ways, they look to see whether firms are competing on price?

A Yes.

Q Then in another one of your answers to both Mr. Shuster's question and a followup by Judge Padova you said about discounting, well, Judge, gosh, Comcast doesn't necessarily even when people complain about the high prices, they don't necessarily offer a discount from that high price, they will offer them some non-price emoluments -- you didn't use the word emolument but I will. It's a legal word.

A In spirit, yes, I said that.

Q Sure. And that's in fact an exercise of market power, isn't it, Dr. Chipty, that when somebody, a customer, subscriber of Comcast calls them up and says your prices are too high, rather than offer them a lower price they offer them something else?

A No, I disagree with that. In fact I would view the offering of some value as a manifestation of competition that **[Page 70]** in fact when -- when Comcast offered value to customers then that value can be provided by lower price and by enhanced service, that value and that competition.

Q Yes, it's competition but competition that you would see one of the competitors, Comcast, actually has market power. If this was a fiercely competitive market you would be seeing people who wanted

a lower price going to the people who offer the lower price, that's what economics teaches, isn't that correct, Dr. Chipty?

A Yes, but in this case what you observe which is also a condition of economics is that oftentimes customers prefer, they make a choice to stay because they like the value that they're getting. Comcast and the satellite company, Comcast and RCN, Comcast and FIOS, they compete in the Philadelphia cluster and where they compete head-on consumers get that value.

Q And you're seeing, where you're seeing more competition you're seeing lower prices, you yourself are seeing it in the data that you receive, correct?

A I am seeing greater value as a combination of lower prices and greater and enhanced service offerings. That --

Q You're --

A Mr. Goldberg, that may be that nominal prices are higher.

Q You're also seeing lower prices when you see greater competition in this market, isn't that correct, Dr. Chipty, **[Page 71]** thinking back on the data that you yourself have reviewed?

A I'm not sure what data you're referring to.

Q Now let me -- sure, let me just tell you. There's more competition in the Philadelphia DMA in 2008 than there was in 2007 because of FIOS, FIOS, right?

A Yes, absolutely.

Q And you're seeing lower prices, the prices that you see in the marketplace, they are lower, isn't it?

A That's right --

Q That's what an economist would expect, isn't it?

A May I answer?

Q Yes.

A What you're seeing by 2008 is more discounting even in Philadelphia because, I believe, of the emergence and penetration of FIOS.

Q Lower prices.

A Yes.

Q Lower prices which is just what you would expect from competition, correct?

A From competition with a wire line overbuilder, yes. And that's consistent with everything that the FCC and GAO have --

Q Let's talk, let's talk about some areas before we go to where you disagree with Dr. Williams and Dr. Sander (ph.) and Dr. McClave, let's talk about some areas where I think you do agree. You, first of all, let's just take the multiple **[Page 72]** regression modeling. You'll agree that generally multiple regression modeling may be an appropriate way to assess overcharges and damages in a case like this. And your dispute here with Dr. McClave is as to data and specification?

A That's not quite right. I agree that multiple regression analysis can be used as a general matter to assess overcharges, impact and damages in antitrust cases. Now it can also be used in a case like

this to assess average impact. It cannot be used, where we differ is that it cannot be used, given the allegation by DBS especially, it cannot be used to assess individual impact that is common across the class.

Q Well, we'll talk about that in a second. And you do agree that generally multiple regression models as a methodology may be used to assess as you've now said overcharge, damages and impact?

A Yes. It depends on the nature, it depends on the fact, it depends on the application and the facts and the application very much affect interpretation and validity.

Q Interpretation.

A And validity.

Q Sure, that's part of the judgment here, isn't it.

A I -- may I clarify? I'm not saying --

Q Absolutely. My questions are for you to answer, Dr. **[Page 73]** Chipty. Please answer the question.

A By interpretation I don't mean a dispute across experts in what data to use or what specification to run but rather the scientific meaning of what you get when you run that regression, whether it is linked in any meaningful way to the allegations and whether it is a reliable meter on the actual harm done at the individual level.

Q Sure. And in fact in the -- you are an expert in economics and the Judge has accepted you in that, you're an expert actually in this particular industry, is that correct?

A Yes, sir.

Q And the Judge has accepted you as to that and you're an expert in econometrics which is the application of statistics to economic issues, correct?

A Yes, sir.

Q But you're not an expert in statistics, correct?

A Statistics as it applies to econometrics I am, sir.

Q Yes, econometrics. That's the application of statistics to economic issues. But you yourself agree that as a statistician you are not an expert statistician, that's something else?

A I agree with that.

Q Okay.

THE COURT: What can't you do?

THE WITNESS: Well, there -- there are whole **[Page 74]** branches of statistics just like in economics. For example, there are -- there's the application of statistics to different engineering and physics and scientific problems that develop different techniques and focus on different things. The reason that it really matters that it's econometrics and not pure statistics is that the types of problems that economists deal with, human behavior, survey data, we don't have clean laboratories that can generate clean data. There are a whole host of techniques, the issue of causality, of what causes it and what's exogenous. These are concepts that are specialized in economics and so because of the types of applications that we have there are specific areas of statistics that we econometricians have actually exploited more and

further developed. There are whole branches of statistics which I know nothing enough about to stand up here and speak. But those do not apply to the types of tools within statistics that apply to economics. And from an econometrician's perspective you have to understand the economics before you can apply the tool of statistics and regression analysis. Applying the tool without having a grounding in the economics results in a disconnect between the model and the actual question at hand.

BY MR. GOLDBERG:

Q And you stated in response to a previous question that when you were discussing interpretation that what you meant **[Page 75]** by interpretation was the statistical interpretation, correct?

A Yes, I did.

Q And in fact --

A In the area of statistics where I have capability.

Q Sure. And you agree that there are in fact statistical outputs that can be reviewed that will tell you how good the model is working?

A There are some meters. None of them is definitive but there are some meters that we look to --

Q And Judge --

A -- for that purpose.

Q And Judge Padova can review because you reported the statistical outputs in your reports, right?

A That's right.

Q And Dr. McClave reported the statistical outputs in his reports, correct?

A Well, I'm not sure what statistical outputs you refer to but Dr. McClave doesn't report nearly as much as I report to provide a window into the data that's generating the results.

Q When you say not as much that's because, as you say, you add your variables one at a time but you are reporting the same outputs. You're reporting T statistics, you're reporting R squares, the coefficient signs are there, correct? Yours and Dr. McClave's.

[Page 76]

A That's certainly true but I report more than that. I give you information on the incremental, the incremental explanatory power of sets of variables as I add them along. You can't see that from Dr. McClave--

Q That's right, like I said, that's why I meant what I said, you add your variables one at a time and record them one at a time.

A And that gives you information.

Q So, well, Judge Padova then can go and he can look at your reports and he can look at Dr. McClave's reports and he can review all of the statistical outputs that you report and he can compare those against the statistical outputs that Mr. McClave's reports and with an understanding of what these statistical outputs mean, and that's a big if of course, but with that understanding he can make his own judgment as to how good your models are performing against how good Dr. McClave's models are performing.

A You know what, I don't think that's a fair characterization. When it gets time to comparing models at that level then you have agreement on methodology, okay, an appropriateness of methodology. There is a lot of disagreement, if you will, but a lot of clear evidence that the type of modeling that Dr. McClave has done is divorced from the allegations and it cannot meter harm at the level that you need to assess the impact of the allegations in this **[Page 77]** case at the household level.

Now, yes, if you want to look at county level models putting all that aside and I say to you, here, I give you two regressions, Judge Padova, pick one that you like or pick one that you think is most reasonable. Then you can look at some of the criteria that Mr. Goldberg just laid out but that in some sense puts the cart before the horse. You first have to evaluate whether this was a reasonable regression to run, whether it has any meaning as a matter of economics and whether it is tied to what the but-for world would have generated absent the allegations. And you need to do all of that assessment before you can evaluate this regression input.

Q You were here in court when Dr. McClave testified?

A I was.

Q Throughout all his testimony.

A I was.

Q You heard him testify that he's done well over 50 multiple regression models to estimate overcharged and damages in antitrust cases?

A I did hear him say that.

Q And this is the very first time that you have estimated a multiple regression model for damages and overcharges and testified to that in a price fixing case, in an antitrust case, correct?

[Page 78]

A No, not quite. I have estimated damages models before. This is the first time I'm testifying to one.

Q Right.

A I have done many, many regression analyses but I have to tell you you can't just count it up, you have to ask in each instance where it has been done was it appropriate, what were the allegations, was it an industry where list people paid list prices, was it an industry where you saw this individualized discounting.

In none of the other cases where I have seen regression analysis used reliably to estimate impact of this type not for aggregate damages but for impact it has to be established and you have to be secure either through some analysis, explicit analysis or some understanding of the facts of the industry that in fact the level of granularity is appropriate. And in this particular case I don't believe that the level of granularity that Dr. McClave has used or that plaintiff's DMA level analysis would require or that even the franchise level analysis that I have done can get at individual impact. It can get to impact on average, cannot get to individual impact.

Q We'll talk about that in a second. As you just testified while this is the first time you yourself has testified to this you've worked on other engagements, correct?

A Yes, I sure have.

[Page 79]

Q And helped other people who have testified?

A Yes, sir.

Q And this is not the first time that you have testified in a proceeding about the economic issues associated with class certification, correct?

A No, it is the first time.

Q This is the first time?

A This is the first time.

Q I'm sorry, I misstated, this is not the first time you have worked on a case where the issue was economic issues associated with class certification?

A That's correct.

Q And in every single one of the cases that you have worked on the testimony and opinions of the expert was that the class should not be certified, correct?

A It happens to be the case.

Q And in every single one of those instances the judge rejected that testimony and certified the class, correct?

A I think that -- that happens to be the case.

Q Now let's go back to where you and the plaintiff's experts may agree on certain things. In your direct testimony I think again in response to a question first by Mr. Shuster and a followup by the Judge you agreed that denial of regional sports networks to a DBS provider would affect the penetration

of the DBS provider in the area and **[Page 80]** hence affect competition?

A I said it could.

Q Now I remember an economic theory supports that, doesn't it?

A Sure.

Q Absolutely.

A I -- I distinguished between the "could" and "does" based on evidence.

Q Well, we'll talk about that because you said something that struck me and maybe I misunderstood. I thought you said that none of the plaintiff's experts did any statistical analysis, any multiple regression analysis on the issue?

A On the issue of -- you have to specify which issue, there are lots of issues.

Q Well, that's, well, that's why I'm asking.

A So what I said and what I -- what happens to be true is that none of the experts in this case have done an analysis of the RSN withholding issue on cable prices.

Q Cable prices. But you've got --

A It did as to heart of impact and mechanism of impact in this case.

Q In fact when Judge Padova who has read this, these reports, this analysis unfortunately for Judge Padova a whole bookshelf of expert reports in this case but if he goes back and reviews the plaintiffs' reports he'll see in fact **[Page 81]** multiple regression modeling done by Dr. Singer, is that not correct?

A Yes, Dr. Singer looked at the determinance of DBS penetration. He does not look at cable prices.

THE COURT: And what was your understanding what his determination was?

THE WITNESS: On penetration? I believe it's Dr. Singer's opinion that DBS penetration in Philadelphia is lower than you would expect it to be and he attributes that gap between what he predicted to be and what it is to the RSN withholding issue.

BY MR. GOLDBERG:

Q Through the multiple, through his multiple regression model.

A No, his multiple regression modeling cannot associate the RSN withholding issue to Philadelphia. All he finds is that after controlling for exogenous determinants his model predicts and I have issues with that as you know that predicted penetration for Philadelphia is above what it actually is, significantly above in his calculation though I think he's misstating that. In any case by observing that gap he says therefore it must be the RSN issue.

Q That's -- that was the opinion that --

A That was the opinion of Dr. Singer.

Q That's the opinion that Dr. Singer. Again you -- we want **[Page 82]** to get something clear here. We don't want to confuse the Judge or mislead the Judge here.

THE COURT: Which is very easy to do.

BY MR. GOLDBERG:

Q Dr. Singer's opinion based on his multiple regression model is that the penetration effect in Philadelphia was because of the RSN denial, correct?

A Yes, that's --

Q Thank you.

A -- absolutely correct. And what I had referred to is a price analysis, not a penetration analysis.

Q You agree also, don't you, that Dr. McClave's model, while you may disagree about many things in Dr. McClave's model, you agree that Dr. McClave's model shows supercompetitive prices?

A No, I disagree with that.

Q You don't, you disagree that it shows that?

A Yes.

Q What does Dr. McClave's model show?

A I think Dr. McClave's model shows that list prices are higher in highly urban areas.

Q I'm asking if there's -- maybe I'm not doing a good job in asking the question. I'm not asking right now for you to quarrel with your, with Dr. McClave's specifications and whatever. Dr. McClave, you were here when he testified in **[Page 83]** court and offered his opinion based on the multiple regression model. Wasn't his opinion that his model showed that there were supercompetitive prices in the Philadelphia DMA associated with the conduct that he assumed because this was plaintiff's allegations?

A So, Mr. Goldberg, let me try it this way. I agree that that's what Dr. McClave --

Q That's what he said.

A -- showing and that's what he said.

Q Okay. Great. And you've had, you've got now and what five reports that you've issued in this case?

A I think so.

Q You have five reports and in your direct examination and even now in my questions because I'm asking you questions and allowing you to speak up, you're getting your opportunity to criticize Dr. McClave and Dr. Williams and Dr. Singer, all I want to do is make sure that we agree as to what his opinions are as an expert. And Dr. McClave said I did a multiple regression model and that multiple regression model showed that there were supercompetitive overcharges in the Philadelphia DMA based on what I assume because I'm not a liability expert, what I assume which is the plaintiff's allegations. Right?

A I agree that that's what Dr. McClave said.

Q Okay, great.

[Page 84]

A To the best of my memory.

Q And, finally, we agree that Comcast offers discounts to its customers, correct?

A Yes, it does.

Q And in order to be a discount from list price it doesn't have to be a percentage discount, it can be in fact a dollar down discount?

A Yes, that's --

Q And that's still a discount from list price?

A Yes, you can inter-- re-cast it that way, you can.

Q Well, I mean let's just take an example. I'm a Comcast customer and I'm paying $105 a month for my service and the fellow in my office says geez, I'm getting it for $79. I call up Comcast and I say this is an outrage. And they say, okay, for you we'll offer a $20 reduction. That's a reduction from list price, isn't it?

A Sure.

Q Okay. Thanks. Now let's turn to Exhibit 71, do you have that there in front of you, Dr. Chipty?

A It's the demonstrative --

Q You and the people at Charles River Associates, that's CRA, right?

A Yes.

Q You and the people at Charles River Associates made up these demonstratives, correct?

[Page 85]

A Yes, we put them together.

Q Sure. You put them together and the idea is to accurately inform the Court of salient issues that you think are important?

A Yes.

Q And you tried to be careful in the construction of these demonstratives, correct?

A I always try to be careful.

Q And you try to be accurate --

A I always --

Q -- in the representations in these demonstratives, correct?

A Yes, sir.

Q And you weren't seeking to mislead either me or Judge Padova or anybody else, is that correct?

A That's correct.

Q Turn to demonstrative Page U. That's the one with the pluses and the minuses?

A Yes.

Q Will you read into the record the title?

A Dr. McClave's model shows negative damages when corrected to use actual prices paid and control for population density.

Q Okay. And as you testified to Judge Padova you said: I used Dr. McClave's model, I changed only two things. I used average prices and you said in fact I didn't even use the **[Page 86]** zeroes and all the other.

A I did --

Q I used average prices instead of Dr. McClave's list prices and I put in the population density variable because you say that's a must have variable?

A It is a must have variable, yes.

Q Right. And I -- and then you said to the Judge Padova those are the only two changes I made.

A It is what I said.

Q That's what you said. That's not true, is it?

A There is one, so --

Q There are two additional changes to Dr. McClave's model that materially affect the outcome there, isn't that correct?

A No, it's not correct. There is one other change which I would consider housekeeping and I'm happy to mention it and --

Q Well, I'm going -- let me --

A -- it is not material but I'm happy to mention it.

Q Let me ask, let me ask the questions and then at the end. Isn't it correct that you changed the specification of Dr. McClave's overbuilder model in the benchmark area?

A Uhm --

Q Isn't that correct, Dr. Chipty?

A No, that's not correct.

Q You did not change --

A I -- I --

[Page 87]

Q If I show you, if we showed the Judge code that shows that you changed?

A Could we look at the exhibit itself? It will show the Judge what's there and what's not there.

Q The exhibit meaning from your report?

A From the report itself.

Q Sure, absolutely. That's why I put the -- that's why I put the reports in front of you.

A If we could go to Exhibit 5 in the May 6th report.

Q Let me get my May 6th report. Excuse me.

(Pause.)

Q Are you at Paragraph 94, Page 46?

A No, but I could be.

Q Well, why don't you, let's do this in order. Why don't you turn to your May --

MR. GOLDBERG: Do you have it, your Honor?

THE COURT: May 6th, 2009. It's Item 2 in the Chipty binder.

MR. GOLDBERG: The title says "Declaration of Dr. Tasneem Chipty in reply to Plaintiff's amended motion to certify the" --

THE COURT: I have that in front of me.

BY MR. GOLDBERG:

Q Turn to Page 46, Dr. Chipty.

A Okay.

[Page 88]

Q Paragraph 94. Read the first sentence of Paragraph 94.

A The introduction of two additional pieces of information discounts off of the list and population density more than half the magnitude on -- more than half the magnitude of the coefficient on the overbuilt variable.

Q And you're talking about the overbuilt variable in the benchmark area?

A That's correct.

Q Okay. Go ahead.

A Dr. McClave estimates the prices in overbuilt areas were about ten percent lower than non-overbuilt areas. But as seen in Column 2 of Exhibit 5 the estimated effect decreases from ten to 4.3 percent

in the adjusted specification and that this effect is no longer statistically different from zero.

Q So you made in fact a re-specification of Dr. McClave's overbuilding variable in the benchmark area, is that correct?

A Well, the --

Q Is that correct.

A -- short answer is yes but that's not an --

Q Great, that's a -- no, no, ma'am --

A -- adequate answer --

Q Ma'am, I'm going to do this the way I want to do this.

THE COURT: Okay. Counsel asks the questions, the witness answers the questions. Mr. Shuster's going to have **[Page 89]** another opportunity.

MR. GOLDBERG: That's right.

BY MR. GOLDBERG:

Q And in fact because of that re-specification which isn't stated in the title to your Page U and which you denied doing in your direct testimony, because of that re-specification the coefficient which is the effect, that's sort of the weight in the -- I think of these as these -- you'll pardon me but I'm not an econometrician either. I think of these equations which are these models as sort of a recipe. And the coefficient, as I told you, the variable tells you throw in flour and the coefficient tells you how much flour. That's the way I think of it. It may be a lousy way to think of it but the coefficient tells you the weight of the variable, right?

A Yes.

Q And the weight goes way down, it goes from over ten percent to less than five percent, correct?

A If you look at Exhibit --

Q No, just answer, please answer.

A No, it's -- it's inadequate to give you a yes or no answer. It's actually technically correct but in spirit incorrect.

Q Okay. I'm going to ask you, I'm going to ask you another thing about that. And in fact you determined that when you, **[Page 90]** when you respecified Dr. McClave's specification for this variable the coefficient not only went down, it was -- it was not statistically different from zero.

A That's in, that's in the list price model of Dr. McClave using average prices the coefficient is statistically significant.

Q Now, we're going to get there in a second.

A But as you see it's not simple --

Q We're going to -- we're going to get there in a second. Hold on for a second. In addition to respecifying Dr. McClave's variable on overbuilding in the benchmark area, Dr. McClave also had an overbuilding variable in the Philadelphia DMA, that's the area of observation, right?

A That's correct.

Q And that's what's called a dummy variable or an indicator variable or a binary variable, it's a zero one variable?

A Yes.

Q And in fact you changed Dr. McClave's variable in the Philadelphia DMA where Dr. McClave

turned on that variable to one in all five counties, you only left it at one in the Delaware County and turned it to zero in the other four counties, isn't that correct?

A That's correct.

Q All right. So now when you said this morning I didn't change anything other than adding the population density and **[Page 91]** substituting average prices for list prices, you weren't telling everything because you made these two material changes to Dr. McClave's model, correct?

A Sir, I did make the change to the overbuilt --

Q And it has an effect, doesn't it, Dr. Chipty?

A And it has an effect in the -- on the estimated coefficient. It is not what is driving the --

Q It has an effect on the results, doesn't it?

A It is --

THE COURT: Finish your answer, ma'am.

THE WITNESS: Thank you. Mr. Goldberg, I agree that I changed, I corrected a mistake in Dr. McClave's construction of the overbuilt variable. I explained it explicitly in the report. Dr. McClave has never objected or complained that in fact he disagreed with my correction of the construction of that variable in the benchmark sample.

BY MR. GOLDBERG:

Q Well --

A And -- and if I can finish --

Q Is that the reason why you didn't tell Judge Padova --

A No, no.

Q -- that you made this change?

A No, quite frankly, I'm glad you pointed it out.

THE COURT: And so am I.

THE WITNESS: Because it was, it was an oversight. **[Page 92]** I should have mentioned it. But the reason that I did not focus on it is because I happen to know that that is not what's driving the negative--

BY MR. GOLDBERG:

Q It is not?

A -- coefficient patterns.

Q Have you checked? When you just said that to this Judge under oath in this court did you -- do you have any basis to say that it doesn't change these pluses and minuses?

A It may change some of them--

Q Because I'm going to show you --

A -- but, sir, it --

Q Sure does.

A -- there are definitely pluses and minuses at the end of the day when you make the changes --

Q Let's take one example. Look at Philadelphia County. What do you have on your chart?

A You have negative prices?

Q No, you have negative.

A In every year for Philadelphia --

Q And if in fact you do not change, I'm not even going to talk about the population density vari-

able that you and Dr. McClave disagree about bitterly, I'm not going to even talk about the average prices versus list prices that you and Dr. McClave disagree about bitterly, but if you don't make those **[Page 93]** changes to his overbuilding variable both in the benchmark and in the area of observation isn't it correct, Dr. Chipty, that those minuses in 2003 become a plus, in 2004 become a plus, in 2005 become a plus, in 2006 become a plus?

A Sitting --

Q Isn't that correct, ma'am?

A Sir, sitting here right now I don't know but I will point out that there are still two minuses. So and those minuses will persist in 2007 and '08.

Q Is it your own testimony to the Judge that it's okay to exaggerate the results?

A No, sir, I'm not, certainly not.

Q Oh, okay, I just want to, I want to make sure.

A And as I -- as I told the Judge and as I referenced in the demonstrative itself, this is a summary of Exhibit 6 which ties to Exhibit 5 which lays it out very clearly what's been changed and what's not been changed. And it was really, it was really wrong of me not to point this out, it was certainly not intentional and I'm so glad that we cleared the record.

And quite frankly at the end of the day--

Q What's --

A -- whether you make that change or not you still get negative damages in many years in many counties and if the Court would like I can have a se-

cond chart drawn up to show **[Page 94]** you exactly what --

Q I actually did have a chart drawn up, Dr. Chipty, not surprisingly because in fact I wouldn't be asking, I wouldn't be allowed to ask you these questions if I didn't have a basis to ask them.

MR. GOLDBERG: What's the next exhibit number?

(Pause.)

MR. GOLDBERG: We have something, thanks.

I'm going to mark this, your Honor. I'm not sure that this will get in without objection but I'm going to mark it so at least we have a good record, your Honor.

(Pause.)

MR. GOLDBERG: I'm marking this for identification, your Honor, I'll alert the Court and the defense counsel, I'm going to move its admission. I don't know whether I can make enough of a record for it but I --

THE COURT: What's the exhibit number?

MR. GOLDBERG: It's 61, your Honor. Here's a copy for counsel. I have a copy for your Honor, if I may.

THE COURT: Copy for the witness?

MR. GOLDBERG: I've got a copy for the witness also, of course, your Honor.

(Pause.)

BY MR. GOLDBERG:

Q When we saw, for the record, when we saw your **[Page 95]** demonstratives, Dr. Chipty, and saw the heading on the demonstratives I asked the Infotech people and Dr. McClave to first check and make sure that it was correct that you had respecified the overbuilding variable in the benchmark area and that you had in fact shut off the dummy variables in four out of the five counties. And of course you would agree with me, Dr. Chipty, that both of those changes would have the effect of lowering damages?

A Yes, they would have that effect.

Q Sure. And I asked them to then run the changes as you had touted them and you, that is only with the population density variable added and with the substitution of average prices for list prices. And you see that first in 2003, 2004, 2005, 2006 the minuses change to pluses, do you see that?

A Yes, I do.

Q Do you see that in Delaware in 2005 and 2007 the minuses changed to pluses, do you see that?

A Yes, I do.

Q Do you see that in Montgomery County in 2007 the minus changed to plus? Do you see that?

A Just one second. Yes, I do.

Q Do you see in Bucks County north of here that the minus in 2007 changes to a plus, correct?

A Yes, I do. But may I ask --

[Page 96]

Q No, let me just finish. The shading is just a high, to highlight the areas. We added the shading. Let me just add one other thing: why didn't you report Burlington County in your exhibit? Burlington County is in the DMA, isn't it?

A That's an excellent question, sir.

Q Well, occasionally I stumble into one, Dr. Chipty.

A It's just that it's a sheer error.

Q It's an error.

A An error.

Q So if in fact we put them in we find pluses in 2003, 2004, 2005, 2006, 2007?

A And a minus in 2008.

Q And a minus in 2008.

A And you can see that in Exhibit 6 of my Panel B. So this is an error of transcription from the Panel B of Exhibit 6 in the rush of getting these demonstratives to you. So and it's just an omission --

Q You have no reason to doubt the accuracy of Exhibit 61?

A No, I have no reason to doubt it although I would like to check it when I get off the stand. And I would point out that there are still negatives in many years, Cape May is still negative everywhere. The point I was trying to make with Exhibit 6 in my report and with this demonstrative is that even with Dr. McClave's general approach not questioning anything about his benchmark sample you see negative damages **[Page 97]** in many counties and many years and that result is driven by the change, the two changes that I highlighted. And I highlighted

those because I knew that without those you don't get this result.

Q No, actually, yeah, that's right. You're absolutely right. We do agree that without putting in the population density variable, that's driving that.

A And --

Q But in fact what's driving a lot of these negative numbers is the changes that you made and did not disclose and that is the changes to the overbuilder variable, isn't that correct, Dr. Chipty?

A It -- you've certainly highlighted this, Mr. Goldberg, but I still count a lot of county years, close to a third of the sample just based on my quick count sitting here.

Q How?

A Has negative damages across this --

MR. GOLDBERG: I'll move Exhibit 61, your Honor.

MR. SHUSTER: Objection. There's no foundation for this exhibit or of its reliability.

MR. GOLDBERG: I'll make a proffer, your Honor.

MR. SHUSTER: The witness doesn't know.

MR. GOLDBERG: I'll make a proffer, your Honor.

THE COURT: Okay. When we get to your case you can put on the person who did it and add further foundation to it **[Page 98]** and I'll rule on the objection at that time.

MR. SHUSTER: Okay, thank you.

THE COURT: Or maybe you can just have counsel talk to that person and maybe there will be a stipulation. Right.

MR. GOLDBERG: Sure. We'll do that at a break, that's certainly an efficient way to do it.

BY MR. GOLDBERG:

Q Let's turn to Exhibit 71, I think its S, yeah, S. I was confused by it. What is the provenance of this exhibit, Dr. Chipty?

A I'm sorry, speak again?

Q What's the provenance of this --

A Provenance, I don't --

Q Provenance, well, where does it come from.

A Oh. Well, southern New Jersey has been a corp in the Comcast states, they're a collection of franchise --

Q A corp is an internal Comcast that other providers may have but it's an internal Comcast label that they put on a contiguous set of franchises, correct?

A That's -- that's correct, that's correct. And --

Q And this is the southern New Jersey, the southern New Jersey corp.

A Yes, that's right. This is the collection of franchises that Comcast puts under the title "Southern New Jersey" and --

Q Did your -- let me ask you specifically, the CRA people **[Page 99]** under your, because all the work that was done, I think it's in all of the work that was done on Exhibit 71 which is a composite ex-

hibit of all these charts, is all that work done under your direction and supervision?

A Yes, it was.

Q Okay. And you take responsibility?

A Yes, I do.

Q Great. So that's why I want to ask you was this chart prepared by the CRA folks under your supervision?

A Yes, it was.

Q Good. Explain Franchise 78 for me? That's the one that sticks out like a sore thumb, Dr. Chipty.

A Yes, I believe Franchise 78 is one where I have an average price and that happens to be the same as the list price and --

Q Oh, so the list, so there's a -- so what you're saying is that there's no discounting going on in 78?

A I think so, sir. And sitting here right now I can't say for sure. I need to remove the red bar, sitting here right now I just don't know. But that could certainly be added --

Q Actually, isn't -- isn't it a fact that that's not correct, Dr. Chipty? Isn't it a fact that if you remove that red bar you would see a list price representation that is lower than the discount price?

A That --

[Page 100]

Q I -- as a lawyer --

A -- if you represent that to be true --

Q -- I'm representing that to you, Dr. Chipty. I'm representing to you that if you remove the red

bar what you would see would be a blue bar or a blue line that was lower than the discount price. What's going on then?

MR. SHUSTER: Objection, objection. Before the witness accepts that representation I'd like to hear the basis for it. There are differences of opinion on how these things are calculated. Objection.

MR. GOLDBERG: I have a professional basis for this, your Honor, it will come out.

BY MR. GOLDBERG:

Q If in fact my representation is right, Dr. Chipty, explain to the Judge economically --

A Sure.

Q -- what's going on in Franchise 78?

A Sure. This is -- this is actually a great example to talk about. It goes to some of the sloppiness in all of our language in this case. What Dr. McClave is using and what we've been referring to as list prices is not really a list price, it is the modal price.

THE COURT: What's the difference?

THE WITNESS: That is he uses the price that's paid most frequently.

[Page 101]

THE COURT: That, a modal price is the price paid most frequently?

MR. GOLDBERG: Most frequently, yes.

THE WITNESS: That's correct, most frequently while with lots of caveats the way Dr. McClave does it. It's the price that's paid most frequently as long as it's not a price that discounted off of last year. So in the example I showed you in southern New Jersey

the modal price had been the Triple Play price but he doesn't use that. But in many instances the modal price could be the list price but that's not to say that it's the most representative price or the price paid by most people though it's the single most common price.

And so the reason that this might be the case and the reason why I can't answer without actually looking at what's behind the bar is because in principle there is no reason why the modal price is below the average price because it's really not a list price but we've been talking about it like it's a list price. It's been a sloppiness in language but it's something that for convenience it made really no difference. As long as we all understand that what we're talking about when we talk about Dr. McClave's list prices are modal prices.

BY MR. GOLDBERG:

Q Let's turn to Page V.

[Page 102]

A By the way, Mr. Goldberg, before we leave Slide S?

Q Mm-hmm.

A You'll notice this is why I often, not always because I can get a little sloppy about this, I often try to put the word "list" in quotes. It's not list price, it's the modal price and it can be the list price.

Q In fact isn't it correct, Dr. Chipty, that when you look at Dr. McClave's data the list price that he lists for Franchise 78 for this is July 2008, the list price that he lists for Franchise 78 in July of 2008 is identical to the list price for Franchise 77 and Fran-

chise 79 or Franchise 80 or Franchise 74, Franchise 75.

A And --

Q In fact he does not claim that the list price for those, for Franchise 78 is lower than your average price, that's your mistake and not his.

A I don't understand what you've just said--

Q Did you -- did you go and check or have somebody under your direction check to make sure your representation of what you call Dr. McClave's list prices here were accurate?

A I did not personally check.

Q Let's turn then to --

A But it was done with my description and my full understanding that the blue bars come from Dr. McClave's backup.

[Page 103]

Q Well, again if we get Dr. McClave on the stand or we have Dr. McClave talk to counsel then I will represent to you that the list price in fact would be identical to those other list prices that you see there for Franchise 77, 76, 80, 81, and you can't contest that, can you?

A I -- I have -- I have a hard time believing that.

Q You do?

A Sitting here right now, yes, I have.

Q Okay. I'll --

A Sitting here right now I'm not --

THE COURT: The witness is not going to accept that.

MR. GOLDBERG: All right, great, then okay, then we'll put --

THE COURT: You're not going to accept it.

THE WITNESS: No, I --

THE COURT: You'll wait to see and hear.

THE WITNESS: -- do my own check and I understand what happened. There is no way I --

THE COURT: Next question, Counsel.

BY MR. GOLDBERG:

Q Number V, letter V, the last slide on that chart, you weren't trying to overstate things here, were you, Dr. Chipty?

A No, I wasn't trying to do anything other than report what I described in, I believe, my August 21st --

[Page 104]

Q What you're showing, I think what you said right at the end of your discussions, "I was shocked to find," you used the word "shock" "that Dr. McClave's model," which of course he says is not his model, "that Dr. McClave's model shows $675 million worth of damages based on B1 prices only.

A Based on an overcharge calculated in B1 prices, yes.

Q You didn't multiply that overcharge on B1 revenues only, did you?

A No, of course not.

Q Of course not.

A Dr. McClave has modeled overcharges. He takes the overcharges and he applies them to total revenue. the overcharged percentage that Dr. McClave calculated with his benchmark sample is 13 percent. The overcharged percentage that Dr. McClave finds, that you find if you run Dr. McClave's machine over the B1 prices is merely ten percent. Ten percentage points of the 13 percentage points of damages are being driven by something that should not have happened. That is the point that --

Q Do you know what the B1 revenues are?

Q No, sitting here right now, I don't.

Q Do you know whether the B1 that they overcharged that may be attributed to the Bl, the B1 component of the expanded base applies is disproportionate to the B1 revenues, to the overall revenues? Do you know one way or the other? **[Page 105]** Do you, Dr. Chipty?

A I don't know the exact number, Mr. Goldberg, but I do know that B1 revenues as an aggregate are lower than total revenues and in fact may even be less than half. In fact, I want to say for sure but you have to be careful, they -- they're probably less than half but that's not the point here. The point here is to illustrate that Dr. McClave's model detects overcharges in instances where they couldn't. So I could have stopped at the 13 and the 10 percent but to further illustrate and give you an order of magnitude of what that does to the types of damages that are being sought in this case I applied it to the same revenues to which Dr. McClave applied his 13.1 percent overcharge, to give you a metric, a different metric from the other metric that I already gave you in the percentage column about the effect of this --

this regression model that's picking up something that it probably should not.

MR. GOLDBERG: Thank you, Dr. Chipty. I pass the witness, your Honor. Subject again to --

THE COURT: Sure.

MR. GOLDBERG: -- if I have to bring somebody else on.

THE COURT: Go ahead.

MR. SHUSTER: Thank you.

REDIRECT EXAMINATION

[Page 106]

BY MR. SHUSTER:

Q Dr. -- once again -- Mr. Goldberg --

MR. GOLDBERG: Yeah, I'm not a doctor.

BY MR. SHUSTER:

Q Mr. Goldberg started out asking you about list prices and discounts and asked you if you can back into a discount percentage off a list price if you know the discount price and you know the list price.

A Sure.

Q Does Dr. McClave do that?

A No, that's not what Dr. McClave does. He -- he compares list prices to list prices and he looks at the difference of that and says there is a percentage overcharge in list price. So he, nowhere in Dr. McClave's analysis does he evaluate the discounts or does he back into the discounts that are being offered in the benchmark sample relative to Philadelphia.

Q And are there any data now, now that have been presented to the Court that could demonstrate

that there's a consistent level of discount percentages or anything of the kind other than your average price analysis?

A I'm sorry, I don't understand.

Q I mean did, if Dr. McClave didn't calculate, didn't back into this calculation that Mr. Goldberg was suggesting could be done is there any way the Court can evaluate that, that you know of?

[Page 107]

A Yes, you could use the demonstrative we've just finished with the pluses and minuses, you could use what Mr. Goldberg is trying to admit as Plaintiff's Exhibit 61 and various other things in my report including, by the way, my own affirmative analysis which are Exhibits 1 and 2 of my August 21st report which is my analysis, not based on Dr. McClave's work, that uses average prices, actual prices paid, that uses a fuller specification and uses a richer set of counties for comparison. And in all of those instances you will find that when they use actual prices it makes a big difference in the impression you have about coming with an impact over for each county in every year.

Q Okay. And that's --

A Including, by the way, Mr. Goldberg's Exhibit 61.

Q And that's what led to -- and that's what led to your calculation of the negative damages in various counties and various county years?

A That's right.

Q That you're using average, not the list?

A That's correct, that's one of the reasons.

Q Okay. Now Mr. Goldberg pointed out that you had adjusted Dr. McClave's overbuild variable from one to zero in four out of five counties but he didn't want to, he didn't want at that time to hear your full explanation for why you don't think that's driving your results.

[Page 108]

A Yes, because, yes, thank you, Mr. Shuster. So let's go back. This is Exhibit 5 in my May 6th report. What I was trying to explain about the Exhibit 5 is --

THE COURT: We were at Page 46.

BY MR. SHUSTER:

Q Page 46 is the paragraph number, Exhibit 5 is the actual presentation of data.

A The actual exhibit itself, your Honor, lays it out, it's pretty explicit.

THE COURT: Exhibit 5, okay.

THE WITNESS: This shows you the regression model, column one is Dr. McClave --

THE COURT: I just want to make sure I have Exhibit 5 in front of me. What is Exhibit 5? Oh, I see, explanatory variables.

THE WITNESS: Yes.

THE COURT: It's in --

MR. SHUSTER: Exhibit 5 is Dr. McClave's specification corrected and expanded.

THE COURT: I have it, okay.

THE WITNESS: So Exhibit 5 is the regression that underlies Exhibit 6. And what I intended to

show in that demonstrative that we went through was Panel B of Exhibit 6. So -- so Exhibit 5 is really where the regression results are presented. And as you see in Exhibit 5 there is an overbuild **[Page 109]** variable and then there's a corrected overbuild variable, okay. In my May 6th report throughout to August 21 I've explained at various points in time that there's a mistake in how Dr. -- by the way, Dr. McClave does not calculate the overbuild information. As I recall, Dr. McClave relies on a calculation by Dr. Williams for this overbuild variable. And based on my review of that work I found a mistake in how the variable was calculated. It was a legitimate mistake that needed to be corrected. I explained what it was, I corrected it. At no point did Dr. Williams ever take issue with that correction.

So what I'm calling corrected overbuild is simply to correct. And it is true, Mr. Goldberg is absolutely correct that I have shown you the effect of correcting that overbuild variable in Dr. McClave's model using modal prices and in Columns 3 and 4 where I switch over to using Dr. McClave's average prices.

And you will see that in column 4 when you move from the original overbuilt variable to the corrected one the coefficient estimate does go down but it remains statistically significant.

BY MR. SHUSTER:

Q Now let's just quickly look at Exhibit 6, exhibit the next page, Exhibit 6 is the basis for the chart that is in your demonstrative package here, D-71, right?

[Page 110]

A Yes.

Q And this is the one that shows your results making the adjustments that you disclose in Table 5?

A Yes.

Q And the adjustments that you made in Table 5 were reflected in your reports and were made known to defendant's experts?

A Yes, and they're also discussed in the body of the text, not just --

Q Now why do you say that the, that making the adjustment to the overbuild variable doesn't drive your results which you said but then you didn't get a chance to explain?

A Yes, well, the result to which I'm referring here is the fact that the model, Dr. McClave's model produces negative damages in many counties in many years. And I have -- I have, I've almost been accused of doing too much work. I've done a lot of work on this case and I have merely understood over time what the individual effects of the different changes are. And I know, I don't remember everything sitting here now, the details of it, but I know that I have run this model incrementally and so I knew that the effect of the negatives, the result that I want to emphasize here is really being driven by the list, the change away from list prices and the use of population density. And that general pattern, in my opinion, if I accept Dr. -- Mr. Goldberg's **[Page 111]** representation of this new exhibit that he put forward it does not change my opinion that I have negative damages in many counties in many years. And --

Q Let me ask you this --

A And so --

Q Let me ask you this --

A So this is what I meant.

Q When you say so then plaintiff's experts don't dispute that if you adjust for population density and if you use actual prices you come up with negative damages in various years in various counties during the class period, right?

A Yes. Assuming Mr. Goldberg is -- is accurately reflecting what this new exhibit he's put up --

Q I mean even on his exhibit there are negatives?

A Yes, but this is my point.

Q And --

A Take May, for example, is negative in every year.

Q Okay. And how do we know, how do we know that for some class members they were just in the class in the negative year?

A We don't know.

Q How do we know that there are people, potentially large numbers of people, we're talking about Philadelphia where even in their analysis not making the change for the -- not making the change they don't even contest to correct the **[Page 112]** overbuild, the variable, even plaintiffs' corrections show negatives in Philadelphia for, say, 2007, 2008 and they don't even dispute that making your changes there's negatives in other years? How do we know that large numbers of class members are not just living in Philadelphia in those counted years?

A You can't know. You can't know and this is why we can disagree on how to calculate damages

but this table shows, even Mr. Goldberg's table shows there is no common impact, even across the counties over the years and certainly you can't know within the county --

Q And then --

A -- any year.

Q And then two quick further things. You mentioned that Dr. McClave uses the modal price and that's the most commonly paid?

A Yes.

Q And then it assumes everybody pays that?

A That is correct.

Q Even though that is not factually accurate, right?

A That's correct.

Q And then, finally, your calculation of -- your calculation of or your finding that Dr. McClave's model shows damages just on the B1 rate?

A Yes.

[Page 113]

Q And Dr. -- Mr. Goldberg, Mr. Goldberg questioned whether you applied that math to the total revenues on B1 and B2 or not. Even if you applied it just to the B1 revenues it's still going to show hundreds of millions of dollars in damages, right?

A It is going to show large damages --

Q That should not --

A (Inaudible) . . .number. . .

Q That should not exist because they're just unregulated rates?

A That's right.

MR. SHUSTER: No further questions.

THE COURT: Anything further?

MR. GOLDBERG: Your Honor, many judges don't even allow recross, your Honor, I'm sorry.

THE COURT: Thank you, Dr. Chipty, you're excused.

(Witness excused.)

MR. KORPUS: Are you ready for Dr. Teece?

THE COURT: Sure.

MR. KORPUS: I call Dr. David Teece.

THE COURT: About how long do you think? Don't we have --

MR. SHUSTER: Oh, you know what, it's 12:20. Yeah, it makes no sense.

THE COURT: Okay, let's break for lunch and we'll be **[Page 114]** back at 1:20.

COUNSEL: Thank you, your Honor.

(Court in recess; 12:18 to 1:21 o'clock p.m.)

THE COURT: Good afternoon.

COUNSEL: Good afternoon, your Honor.

MR. GOLDBERG: Your Honor, I believe that we resolved the differences with respect to Exhibit 61.

THE COURT: Very well.

MR. GOLDBERG: So I will re-move, I will re--

THE COURT: It's admitted without objection. Okay.

(Plaintiffs' Exhibit 61 received in evidence.)

THE COURT: Okay, next witness.

MR. KORPUS: Your Honor, I gave you a binder with some documents for Dr. Teece.

THE COURT: Okay.

MR. KORPUS: Really what the plaintiffs are doing is truncated (inaudible) go through demonstratives, that are (inaudible) the binder. And I'm not even going to go through all of those unless your Honor wants me to.

DAVID JOHN TEECE, Defendant's Witness, Sworn.

THE COURT CLERK: Please state your name and spell your last name for the record.

THE WITNESS: David John Teece, that's T-e-e-c-e.

DIRECT EXAMINATION

BY MR. KORPUS:

[Page 115]

Q Where do you work, Dr. Teece?

A I'm a Professor in the Hass School of Business (ph.) at the University of California Berkeley.

Q And what is your specialty?

A My specialty is the field of industrial organization, covering the economics of pedagogical (ph) change, antitrust economics, technology strategy, technology management.

Q What's your educational background?

MR. KORPUS: Your Honor, would you like me to qualify the witness?

THE COURT: No, we have his CV with his material which we accept without objection.

Any questions with respect to this witness' expertise, plaintiff?

MR. GOLDBERG: No, your Honor.

THE COURT: Okay, we do accept the doctor as an expert in industrial organizations.

MR. KORPUS: Antitrust economics is the way we've--

THE COURT: Absolutely, in antitrust economics.

MR. KORPUS: Thank you, your Honor.

THE COURT: Welcome to the Eastern District.

THE WITNESS: Thank you, your Honor.

THE COURT: You may proceed.

BY MR. KORPUS:

Q Professor Teece, did you prepare some slides that **[Page 116]** summarize your opinions today?

A I did.

Q And you only have a set in the flecked binder, thank you, they're marked as Exhibit 86.

MR. KORPUS: I move them into evidence now.

THE COURT: D-86 is admitted without objection.

(Defendant's Exhibit 86 received in evidence.)

BY MR. KORPUS:

Q Professor Teece, let's go to Slide 1.

MR. KORPUS: Slide 1 is a summary of his opinions, your Honor, that I don't propose to go over unless you would like me to but to move things along.

THE COURT: No, it's self-explanatory.

MR. KORPUS: Yes.

BY MR. KORPUS:

Q Have you reached some opinions concerning plaintiffs' definition of the proposed geographic market in this case?

A Yes, I have.

Q Could you please tell his Honor what those opinions are?

A The DMA is not a relevant antitrust market, your Honor. If you apply the guidelines methodology of the Federal Trade Commission and the Department of Justice you end up with a household and that's because under the methodology you ask the question if prices were raised, if there was a hypothetical monopolist who controlled that area and raised **[Page 117]** prices, could they switch. The answer is no, that defines the market. If the answer is they can switch, you keep expanding the market. So the application of the merger guidelines approach leads to very small markets here, your Honor. Not to say that statistical reasons one might not look at a franchise area of a county or DMA. But one has to remember all the time they're not relevant antitrust market.

Q Were you present in the courtroom while Dr. Williams testified?

A I was.

Q Were you here when he said if you look at just the household in the franchise area nothing really changes as a result of the transaction so you've got to look at larger areas. Do you recall that testimony?

A I recall it.

Q And what's your opinion about that testimony?

A I was extremely surprised because it's a departure from the methodology and it's moreover an admission that these transactions don't change anything at the level of a household. And so I think it's completely wrong, it's assuming a conclusion.

Q Now if you do take the larger geographic market proposed by plaintiffs, the DMA, are the competitive conditions identical throughout the DMA?

A No, there's enormous heterogeneity inside the DMA because **[Page 118]** of the presence of different competitors, because of different income levels, different demographics, it's a very heterogeneous area.

Q Okay. Let's just deal with competitive conditions quickly for his Honor. Do you have some slides on the competitive conditions in the DMA?

A I do.

Q So let's turn to Slide 3. What does that show?

A That slide shows that if you looked at FIOS, for instance, that it is being rolled out or being approved only in some areas, in expanding number of areas but clearly the impact of competition from (in-

audible) . . . is different in different parts of the DMA. So it points to heterogeneity, not homogeneity.

Q And how does that affect the question of which geographic market you should look at when determining whether or not the subscribers in a class have been impacted on a class-wide basis?

A Well, it doesn't speak directly to that. It does speak to the fact that there's heterogeneity inside the DMA and if you looked at individual households you would not find any effect from the transaction. So in terms of the change in concentration which the whole idea of market -- of market definition gets you to the question, all right, do the transactions change anything the answer is no, they don't.

[Page 119]

Q Let's go to the next slide. What does that show?

A This shows RCN service areas and, you know, what is apparent from that is that they are very localized. So inside the border DMA there's some areas that are impacted by RCN and some that are not.

Q And what about the next slide?

A Next slide tells a similar story in this case with respect to DBS of penetration is different in different parts of the DMA. While satellite may be available in most if not all, the impact is different so in terms of the nature of competition it speaks to a very variegated geographic area.

Q Okay. Now let's go to the transactions and you mentioned this a little already.

MR. KORPUS: Slide 6, your Honor, summarizes your, they are an overview of the plaintiffs' theories of impact from the transactions.

BY MR. KORPUS:

Q Have plaintiffs presented any economic evidence that the class can use to show common impact on any of the theories arising from the transactions?

A I do not believe they have put forward evidence to show common impact, an impact in many cases they agreed that there is a common impact.

Q Okay. Maybe you can walk through these theories for your Honor and state your opinions about them?

[Page 120]

A Well, I will look and walk through these theories very briefly, your Honor. If we had more time I'd spend more time on each. And I will --

MR. KORPUS: And I'd just say, your Honor, that you do have a slide on each one of them.

THE COURT: I do.

THE WITNESS: Okay. And I will address the nature of the antitrust theory and also the common impact question. The first one is the alleged loss of potential competition from adjacent MSO's as a result of posturing. Well, the key salient empirical facts are that MSO's don't compete. There is lots of evidence in the record that the business model for overbuilding by MSO's doesn't work, there's no money in it. So there's no loss of potential competition because MSO's are not about or were not about to overbuild each other.

Moreover, even under Dr. Williams' theory if they would have, it would only be with respect to adjacencies. So there can't possibly be common impact because the whole region is not an adjacency. So I think the theory is flawed in the sense it was not based on any evidence, secondly, even if it is correct, there is no common impact.

Q Move on to the next one.

A Second one is the alleged loss of competition for original franchise rights. First of all, this is in a different market, this is not the market for -- that is a **[Page 121]** focus here, this is a different market, namely the market for original franchise rights.

First point I'll make is that these franchises were all given out, at least 98 percent of them were given out before the class period and so there's no fundamental change in any way because of the transactions with respect to original franchise rights. And there is the differential impact to the extent to which, you know, the two percent is not the whole market.

Q And what about the loss of competition for the position of the existing cable systems?

A This once again is a different antitrust market. It's not even an antitrust market that's been specified. We are talking about the market for corporate control as, somehow or other, all the potential required or requires being eliminated by the clustering. The answer is no. And so there's still, you know, acquisition opportunities left.

Q And we heard some testimony about benchmark testimony. Have plaintiffs presented any economic evidence that a class can use to show com-

mon impact from the elimination of benchmark competition?

A No, they have not. And I find the whole, this whole argument, your Honor, extremely curious. In the textbooks we recognize actual competition and we recognize potential competition. Now what Dr. Williams has done is create a **[Page 122]** third category, I believe, for purposes of this case, called benchmark competition. It's true that regulators occasionally benchmark one area against another, but there's no evidence here that there can be competition because if consumers don't know about-- even if consumers know about what's going on in another franchise area, they don't have a choice. So it doesn't impact their decisions in any significant way. So this whole notion of elimination of benchmark competition is a new one to me and I believe it doesn't have a proper foundation in antitrust economics and there is no evidence to support that it makes a whit of difference.

Q Well, when you say the consumers don't have a choice, what do you mean by that?

A Well, if they observe that in a different region that prices are lower or something or other they're not about to go to that other region to take advantage of the services. So Dr. Williams had a sort of jaw boning theory, well, they'll go call up the MSO, or they'll call up the regulator and that's going to make a difference. And there's no evidence that it does make a difference and there is no evidence that there's any significant change in that regard anyway.

Q What about the allegation that clustering deters cable overbuilders such as RCN, have plaintiffs presented any **[Page 123]** economic evidence

that a class can rely on to show common impact with respect to that theory?

A Well, as I said before, overbuilding is not an attractive business model, certainly not for the MSOs nor is it an attractive stand-alone business model. And RCN has stubbed its toe in multiple places as its come to recognize that there really isn't a profitable overbuilding model. And so clustering has had no effect there either.

Q Have you taken a look at the incidents of overbuilding in clustered versus unclustered areas?

A I have.

Q Maybe you could turn to Slide 12.

MR. KORPUS: Do you have that, your Honor?

THE COURT: I have it right in front of me.

MR. KORPUS: You're ahead of me.

BY MR. KORPUS:

Q And what does this slide show?

A Well, first of all, if you look on the left it's unclustered systems, the amount of overbuilding which is de minimus .56 and for --

Q .86?

A Yes, .86, the (inaudible) on the other side for clustered systems it's actually slightly higher, 4.39. Correlation does not prove causation, your Honor, and I'm not suggesting that in fact clustering encourages overbuilding but it is not **[Page 124]** apparent that there's any negative effect of clustering on overbuilding. In fact the presence of overbuilding is slightly higher when you do have clustering so it's directly opposite of what Dr. Williams' theory would

predict. But I wouldn't read too much into it other than there's no support from this data to Dr. Williams' proposition.

Q Okay. And going back to Slide 6 the last item on your list is plaintiffs' allegation that clustering leads to lower content prices and higher cable prices. Were you here when Dr. Williams testified about that subject?

A I was.

Q And what did you think of his testimony in that regard? I believe he referred to Nash (ph) bargaining theory.

A Yeah, I found this a curious theoretical argument that runs contrary to almost all economic logic. And typically you've got lower prices, if you've got any kind of lower prices then your prices to your consumers are lowered. When the overall cost level falls prices tend to come down.

Dr. Williams says just the opposite, that somehow or other this bargaining power will lead to chiseling down the content prices but that in turn will lead to cable rates going up. And it just is not common economic intuition and I don't believe it makes any sense and nor has he shown any evidence of it.

Q And it's Professor Nash's work, are you familiar with **[Page 125]** Professor Nash's work?

A Yes, I mean, Professor Nash has done work on marketing theory, but just to say, if you used a theory for modeling and applied Nash bargaining, it doesn't establish the correctness of the theory or its applicability to the facts of this case.

Q Now, Professor Nash has not written about cable and cable prices, right?

A Definitely not. His work is highly abstract, very elegant, but highly abstract and it is used by economists and mathematicians, but in the context of building theoretical models and in antitrust analysis in this instance is not furthered by doing a pure theoretical model for which there's no support for either the assumptions or the predictions.

Q Now, I heard Dr. Williams, at one point in his testimony and I don't have the exact quote, so I'm not representing it's the exact quote, but said something to the effect of what observed is that prices go up in the Philadelphia area and therefore, I find that there is less competition. I don't know what kind of competition, it might be benchmark, it might be franchises, it might be something. But I conclude from that, that there is less competition in Philadelphia. Do you recall that testimony?

A Yes.

Q And what was your view on that?

[Page 126]

A Well, there's multiple reasons why prices can go up. If the quality of the product that's being offered, the quality of the service improves, prices can go up. So, you can't make any such straightforward conclusions.

Q If plaintiffs presented any economic evidence that the class can use to show that Comcast has increased market power, as a result of any allegations in the Complaint?

A No.

MR. KORPUS: Your Honor, I was going to move on to DBS, unless you have any questions about the transactions?

THE COURT: I do not.

MR. KORPUS: Then let's go to slide, oh, before I go to DBS, your Honor, this is more a matter for you, but if you look at -- you asked in the course of Dr. Chipty's examination, for references about RCN and failing to --

THE COURT: I did.

MR. KORPUS: -- complete OBS applications, slides 15 and 16 have the quotes that we rely on from the RCN 10K and from the FCC Seventh Annual report.

THE COURT: Very well.

MR. KORPUS: And there are two documents in your binder as Exhibits 8 and 9, D-8 and D-9 and I move them into evidence.

THE COURT: They're admitted.

(Exhibits D-8 and 9 admitted in evidence.)

[Page 127]

BY MR. KORPUS:

Q So, let's go into the DBS foreclosure claim. Now, that's slide 17, please, Joe. Could you, perhaps, explain to his Honor your opinions concerning plaintiff's allegations in that regard?

A Sure. First point, your Honor, is that the different firms compete in different ways and the competition that you observe in this market, it is in the form of service and quality. It is what I call dynamic competition or theory and competition. And so, the competition here between DBS and cable takes place around content, your Honor. And you could well understand why satellite might wish to have some of the content that cable has and vice versa,

but I take no -- there's no reason to be concerned because not all providers have access to the same content. It's a point of differentiation in the market place and it's a way that competition actually takes place. It's an indication of the presence of competition, not it's absence.

Q Let me just pause you there, Dr. Teece. His Honor asked an interesting question for Dr. Chipty. He asked Dr. Chipty whether if Comcast has exclusive content, some games, local games and competitors do not have access to those games, does that give Comcast more control over prices? I believe that was the question his Honor asked. Do you have an answer for that?

[Page 128]

A I do have an answer for that and your Honor, you have to ask a second question, well, what content does the competition have that Comcast doesn't have? What content do they have and in the case of DBS or NASCAR, they've got the NFL Sunday Ticket and in response to not having the regional sports programming, they can invest in something else. So, the fact that not everyone has the same content doesn't mean that there's the ability to raise prices of competitors levels. And this is the way in which rivalry takes place in this market. It's around content and it's around service and it's around quality.

Q Now --

THE COURT: When you say in this market, you're talking about a product market?

THE WITNESS: Well, yes, in the household market, you know, the way you compete is by providing different programming, different quality service and it's not primarily price competition.

Q You've mentioned a product that differentiate the DBS operators and the fact that they have their own products, such as NFL Sunday Ticket. Do they, in fact, advertise the competitive advantage in that regard?

A Yeah, this is how they, you know, the customers are tossed back and forth and the way that DBS competes against cable, is to point out that they have content that cable **[Page 129]** doesn't have.

MR. KORPUS: Your Honor, I have a couple of short DirectTV advertisements that I thought you might find interesting.

THE COURT: You may, sure.

(Playing of DirectTV advertisements at this time.)

MR. KORPUS: And one more, your Honor.

(Playing of DirectTV advertisements at this time.)

MR. GOLDBERG: I object, your Honor, they didn't put the Patriots on.

MR. KORPUS: We can submit those into evidence. We can give you a disk with them, if you'd like, your Honor. Or not, if you get the point.

THE COURT: Give us a disk, so that it's part of the record, yes.

MR. KORPUS: We'll give you a disk.

BY MR. KORPUS:

Q All right, now, have you seen any evidence that answers to Comcast bought in Philadelphia is essential for the DBS operators to be able to compete effectively?

A I've seen evidence which indicates it's not essential.

THE COURT: Doctor, you've studied in connection with this case, maybe in connection with other cases, the Philadelphia market, the Philadelphia --

THE WITNESS: Yes.

[Page 130]

THE COURT: Do you classify, based on your own economic notions. I mean, do you classify Comcast as having been a monopolist in that market for the areas in question in this lawsuit?

THE WITNESS: Your Honor, it's not a relevant antitrust market. Historically, there has not been as much competition as there is now. The competition that takes place is in the form of DBS and telephony. And to me, the relevant question is not what is the level of competition, but it hasn't been degraded because of the transactions at issue. And the answer is no, in fact, I believe competition's being enhanced because of clustering, because it's enabled the investment to go in to support roll out of new services so that cable can't compete with telephony and with DBS.

THE COURT: I don't think you've answered my question.

THE WITNESS: Sorry.

THE COURT: Okay, would you classify, for any of the years in question, that Comcast is having been a monopolist and let's take any area you want. Okay, let's start with the Philadelphia franchise area.

THE WITNESS: Your Honor, the way that I would put it, if you go way back in time --

THE COURT: Well, I'm talking about the years in **[Page 131]** question. I'm talking about the years in question.

THE WITNESS: Well, there has been three technologies that have been available. There is the telephony more recently, although it's been on the books for quite a while and this being DBS. So, there's three --

THE COURT: I understand that.

THE WITNESS: Yes.

THE COURT: I said at any time during the years in question, the years in question of 2000 to 2009.

THE WITNESS: Right. It's certainly not a perfectly competitive market, but no market is. But I don't believe it's a monopoly at all.

THE COURT: It never was at any time during this period?

THE WITNESS: No, I don't think --

THE COURT: And now we're talking about the Philadelphia franchise area.

THE WITNESS: I don't believe so.

THE COURT: Okay.

THE WITNESS: There being rivalry, there's been rivalry and Comcast, in making its decisions --

THE COURT: Never had the power to control prices in that period of time?

THE WITNESS: Well --

THE COURT: At any time?

[Page 132]

THE WITNESS: -- it could have priced without regard to competition, is the way I would put it.

Q Were you here when Mr. Burke testified?

A I was.

Q And did Mr. Burke, in fact, say that DBS presence was a factor to take into account?

A Yes, if they take it into account in their investment decisions and in many other ways. So, clearly, the presence of alternatives affects business decisions in an intimate way.

Q Now, what -- we talked about the ability of DBS to compete and you mentioned rivalry, I know you have a couple of slides that show that for his Honor. Could we just take him through the next two slides.

THE COURT: Exhibit 5? Oh, 4, okay, let's get 4. Okay, we've got 4 up.

Q So, what does slide 18 show?

A It shows the penetration during the class period of DBS. So, it being there during the class period and in fact, the market share has expanded. So, this is something that it's one of the Damocles Sword that's always hanging over Comcast management, is DBS is there and clearly, they seem to be winning the battle, at least, in terms of taking away some of the households that traditionally used to use Comcast.

Q And this comes straight out of your classification **[Page 133]** report, right?

A Right.

Q And then what does the next slide show?

A Next slide shows that if you compare Philadelphia with the national average, over the time period, in fact, the penetration rate in the Philadelphia DMA has increased faster than it has with all other DMA. So, 327 percent increase versus 155 percent.

Q Now, let's go back to slide 17. I only have a couple more points about DBS foreclosure claim. Has plaintiff presented any empirical evidence of a causal link between DBS penetration levels and cable prices?

A No.

Q Are you familiar with any such causal or I mean, empirical evidence of such causal link?

A No, there really is no such evidence and certainly, with respect to the Philadelphia DMA, there's nothing that shows any linkage between a particular level of DBS penetration and prices.

Q So, just so we get this right, so the presence of DBS in the market has some sort of a price constraint, but not the penetration?

A Absolutely, absolutely. So, as I said before, it's like Damocles Sword, it's hanging out there all the time. So, it has the disciplining effect that it's not any particular **[Page 134]** level. There is no magic threshold with respect to, well, no evidence that whether its ten percent or whether its five percent over the 15 percent penetration that that really affects pricing.

Q So, in this case, plaintiffs claim that if only DBS had access to Comcast SportsNet Philadelphia, they would have had, let's say, six percent higher penetration. Have you seen any evidence that that would affect Comcast's prices in response to those?

A No, there's no evidence to suggest that if they had six percent more or even ten percent more, that that would impact prices. Nor is it consistent with the way that pricing takes place in this geographical area.

Q Have you looked at any government studies that examined the relationship between DBS presence or penetration and cable prices?

A I have.

Q And what's -- summarize for his Honor the net/net of those studies.

A Your Honor, there's been a lot of work done by the FCC, by the GAO and also by the antitrust agencies. And the overwhelming weight of that is that there is no connection between a particular level of DBS penetration and cable pricing. There is one study the GAO-2003, which suggests maybe there's a slight effect, but it's not statistically **[Page 135]** significant. But the FCC and the agencies, the antitrust agencies all speak basically with one voice here, that there isn't an effect. And nor, would I expect one in my overall framework where the nature of competition here isn't price competition, it's quality and it's service. It's what I call (indiscernible) and dynamic competition.

Q Now, finally, even if despite all of these points, plaintiff do manage to show an impact from this DBS foreclosure theory, would that impact be across the entire class?

A No.

Q Why not?

A Because the impact would be localized.

Q In what -- would it vary amongst different areas?

A Yes. I mean, obviously, the penetration rate is different in different regions, according to the suitability of the technology and demands of the consumers.

Q So, going back to slides 5, for example, how did this slide affect the question of whether or not the impact would be uniform across the class?

A Well, the penetration level of DBS is all over the place. As you can see, in more remote areas down in Dover, Delaware, in that general area DBS penetration is much higher than it is in places closer in to Philadelphia. So, there is considerable averaginity (ph) in the impact of DBS and any **[Page 136]** potential price impact.

MR. KORPUS: I'm done with the DBS issue, unless your Honor has any questions.

THE COURT: No questions.

MR. KORPUS: Let's just move on to the last slide, just some observations about Dr. McClave.

Q Dr. Chipty was our main response to Dr. McClave, but you've addressed some of these issues in your report. And without getting into density and the more methodological differences, were you present in the courtroom when Dr. McClave testified?

A I was.

Q And do you have any opinions on his but-for world and they way he constructed his model?

A I do and so, your Honor, my comments have been primarily conceptual and comments directed to Dr. McClave or Dr. Williams, but the gap between

the two. It's ships passing in the night. Every antitrust case that I've been involved in, before you get to damages, you have to specify the but-for world and make the causation link. That bit is missing here. So, Dr. McClave has assumed an outcome. He has assumed that in the but-for world and he claimed to be an antitrust economist, the concentration would be lower and DBS penetration would be higher. There is no connection between, no direct connection between what Dr. Williams testified to **[Page 137]** and what Dr. McClave's model is built on. So, I find that a logical and -- a logical flaw, as well as a methodological flaw in what has been done here.

Q Is there anything else that you would like to add?

A Yes, that you would have expected to see Dr. Williams specify what the but-for world looked like in some detail. That would have assisted Dr. McClave's damages analysis, but that was not done.

Now, I can speak a little bit more specifically to what Dr. McClave did. As I said, he started off with his benchmarks and those benchmarks though, your Honor, are not but-for worlds that were specified by Dr. Williams. They are basically, in my view, arbitrarily chosen and they don't link to the theories put forward on the liabilities side. For instance, the notion that somehow rather DBS penetration should be at the national level, even Dr. Singer's predictions for the Philadelphia DMA don't even show that. So, I find that that is a serious flaw. It was before and what's been done here.

Q Now, Dr. McClave, I believe, testified that he wasn't necessarily looking to specify what the world would like exactly in terms of what Comcast penetration would be in the but-for world. What ABS

penetration would be, but he was looking for a market that has the effects of what that world might be like. What's your opinion of that testimony?

[Page 138]

A That's assuming what has to be proven.

MR. KORPUS: I pass the witness, your Honor.

CROSS-EXAMINATION

BY MR. BARNETT:

Q Dr. Teece, do you have your reports up there?

A Yes, I do.

Q Could you turn to the first one that submitted on April 10th of 2009?

A Yes.

Q I'd like you to turn to page 43.

A Okay.

THE COURT: Hold on a second, what tab number is that?

MR. BARNETT: That's the first one, your Honor.

MR. KORPUS: I don't believe that the binder has the reports.

MR. SHUSTER: The binder only has government reports, but we'll get to your date.

THE COURT: Okay, hang on one second. Yes, I have it. I have it in my Dr. Teece binder that was presented and it's Tab 1.

MR. BARNETT: Permission to hand it up, please?

THE WITNESS: Thanks.

BY MR. BARNETT:

Q Dr. Teece, to orient you, page 43, on the first tab.

[Page 139]

MR. SHUSTER: Just give us a second, sorry.

MR. KORPUS: I'm sorry, the April 10th report, page 43?

MR. BARNETT: Yes.

MR. SHUSTER: Sorry about that, thank you.

THE COURT: Paragraph?

MR. BARNETT: Sir?

THE COURT: Which paragraph?

MR. BARNETT: Well, it starts with the section that's in italics number two.

THE COURT: Very well.

BY MR. BARNETT:

Q Dr. Teece, could you just read into the record what you said on April 10th, in sub-part two on page 43?

A Sure. Paragraph 68 -- "There has been several economic".

Q No, no, no. Read the heading, sir.

A Okay. Two, "Empirical studies indicate that competition from DBS providers and Ilex (ph) constrains cable system pricing."

Q And do you stand by that today, Dr. Teece?

A Well, I have looked at this in more detail. There is a small effect shown by one study, but the weight of the studies -- not the weight of the studies,

but the cumulative impact of the FCC and FTC and DOJ in -- as well as the GAO studies, show that there really is not an impact, if any.

[Page 140]

Q So, are you backing off from this statement that you made?

A Well, I think I'm putting it in context. The context is the other studies I have subsequently reviewed.

THE COURT: Well, Doctor, frankly, I did read this report and I did mark number two. Is there another part of the report that distills number two, that I missed? Or that limits it or --

THE WITNESS: Yes, yes.

THE COURT: Frankly, I concluded from what I read.

THE WITNESS: All right.

THE COURT: Now, you're here to clarify it, but I concluded from what I read that empirical studies indicate that competition from DBS providers and Ilex constrains cable system pricing, that's what I concluded.

THE WITNESS: Okay.

THE COURT: Was that an error on my part? Should I not have concluded that?

THE WITNESS: Well, you see, I've done subsequent work because the foreclosure issue was not really a central issue, at the time. There is some evidence, as I indicated on my direct, there's one GAO study that shows an effect from DBS pricing, excuse me, from DBS penetration. This refers to both DBS and Ilex, but with respect to DBS, there's only one

study that really shows an effect and it's very small and **[Page 141]** it's not even clear or statistically significant.

THE COURT: Well, let me read to you the third sentence. "Some studies", plural, "have estimated empirically, the competitive constraint that DBS imposes on cable system pricing."

THE WITNESS: Yes.

THE COURT: Are you saying now there's only one study that does that?

THE WITNESS: Yes. And then I refer to this GAO study.

THE COURT: As an example, so, that sentence is not really accurate, that I read, it's only one study and that's the GAO study.

THE WITNESS: Well, there are other studies, your Honor, but here is what they do and here is what they don't do. What you need to understand is DBS does have an overall disciplining effect on the market. No question about it. But what plaintiffs are trying to say is that there is a relationship between a particular level of penetration and pricing. There is no evidence for that. There is evidence and I'm not backing away from it, at all, in fact, it's a key part of my thesis, that DBS defeats. But the nature of the competition manifests itself primarily in what I call non-price competition. Namely service, quality, penetration and so forth.

[Page 142]

THE COURT: Go ahead.

MR. BARNETT: Thank you, your Honor.

BY MR. BARNETT:

Q Just continuing in paragraph 68, on page 43 of your original report. I'm just going to read it for you so we don't have a hiccough in it. "For example, a GAO study concluded that DBS competition has restricted cable prices." Did I read that right?

A You read it right.

Q Are you backing away from that?

A No, I'm not.

Q The next sentence says, the study found that "as more households subscribed to DBS service, cable operators will ultimately respond by reducing prices." Are you backing away from that?

THE COURT: It reads, "by reducing rates."

MR. BARNETT: "By reducing rates," yes, thank you, your Honor.

Q Are you backing away from that, Dr. Teece?

A No, but I'm putting it in the broader context.

Q Well, let's look at the context. Do you see, you dropped a footnote at the end of that?

A Yes.

Q The sentence that follows the side says, particular, the study finds that a ten percent increase in DBS **[Page 143]** penetration leads to a 15 cent reduction in monthly cable rates." Did I read that right?

A You read it right.

THE COURT: That's a pretty important statistic to the issue that we've been discussing, isn't it?

THE WITNESS: Well --

THE COURT: Or am I missing something?

THE WITNESS: -- yes and no, your Honor. I know you hate those --

THE COURT: I do, yes.

THE WITNESS: First of all --

THE COURT: It usually indicates to me, based on my limited experience in this business, that I'm not going to get an answer, but go ahead.

THE WITNESS: Well, first of all, it's a 15 cent, not 15 percent, 15 cent. So, it's a tiny effect. If you dig into the analysis further, the statistical significance is not established at the traditional five percent level, it is established at the ten percent level. So, this one study does show a tiny effect. But my point is that you have to put it in the context of everything else. And this is the outline.

THE COURT: Some of which, you've told me in your report. Everything else --

THE WITNESS: Yes.

[Page 144]

THE COURT: -- do I have everything else in your report and I want to put it in context?

THE WITNESS: Yeah, I think you do have most everything else in my report, your Honor.

Q And just to be complete on this paragraph 68, Dr. Teece.

A Reports, plural, now.

THE COURT: Yes, that's right.

Q Dr. Teece, in paragraph 68, you cite "FCC economists Wise and Dewaddy, who performed an

econometric study of cable system pricing and found that, "DBS providers are a constraining factor on quality adjusted price increases for basic cable services by cable firms."

A It's absolutely correct and that's what I've been saying, but it's not what you are trying to say.

THE COURT: Well, then how about the next sentence. "Similarly, an empirical study by Austin Goolsbee (ph) and Amil Petrin indicates that more competition from DBS is co-related with lower cable prices."

THE WITNESS: Yes, your Honor. Now, more competition does not mean a higher level of DBS penetration or some, some measure of market concentration. It's more competition. Competition comes in in many different ways, superior quality, more investment, et cetera, et cetera. These are reasonably subtle issues, I understand, but it doesn't say what the plaintiffs are trying to make it say.

[Page 145]

Q Dr. Teece, were just reading what you wrote in your report, which I think you signed under oath.

A Correct.

Q And just to be complete, paragraph 68 has Footnote 138, which ends with this statement. "The study", referring to the FCC econometric study, "the study based on FCC collected cable price data for the entire U.S. in 2002, indicates that when cable price increases exceed consumer switching costs, consumers will switch from cable to DBS." That's what you said in your report, is that right?

A That's correct.

Q Dr. Teece, you testified in your deposition, in May of this year, that you know that the FCC has designated Comcast SportsNet as must have programming.

A Yes.

Q You know that?

A Yes.

Q And you also know that the FCC, in 2007, agreed with the 2002 finding that they made, that withholding that programming from DBS providers and other would-be entrants, has a material adverse effect on competition, right?

A They said something like that, yes.

Q And you don't have any basis for refuting that here today, is that right?

A If they substituted the word competitives for **[Page 146]** competition, I might agree.

Q So, you disagree with the FCC on that point?

A I think, at the end, I do. I think that the old fashioned, made the old-fashioned mistake in confusing an impact on a competitor or possibly two competitors, with an impact on competition, which is a process.

Q Could we take a look, I'm switching a little bit, your Honor. I just have a few things to go over.

THE COURT: Sure.

Q Could we look at Teece slide 18 for a minute? Dr. Teece, this is entitled DBS Penetration in Philadelphia DMA during Class Period, is that right?

A Yes.

Q That's not DBS penetration, is it? That includes Fios, right?

A It's a -- okay, its ADS penetration.

Q Right, ADS includes Fios and anything else that's not cable, right?

A That's correct.

Q So, some of the increase that we see in DBS penetration, according to your chart, is actually Fios taking off in Philadelphia in more recent years, right?

A At the end, a little bit of that could be Fios related.

Q Right and I guess we see, at the end, that it's kind of flattened out, is that what that shows?

[Page 147]

A Well, the last, during 2008, I think there's only limited observations in there. It's increasing, but increasing not as fast as it did earlier.

Q Okay. And if I could, your Honor, I'd like to put one of the big boards up that Dr. Williams looked at?

THE COURT: Go ahead.

Q Just for the record, we're looking at Plaintiff's Exhibit 92, it's entitled "DBS Penetration Range, U.S. versus Philadelphia DMA. And I'll represent to you, Dr. Teece, if you're not familiar with this, that we have also given the benefit of the doubt to Fios as being penetration that's relevant to what this chart is trying to show. So, the lines ought to approximate your slide number 18. But do you have any reason to disagree and tell Judge Padova that this exhibit is inaccurate in showing the relation,

over time, between DBS penetration and Philadelphia DMA versus DBS penetration in the United States, as a whole?

A No.

Q Dr. Teece, you told me at your deposition, that market definition is only a tool in antitrust analysis, do you agree with that?

A Yes.

Q It's just a way to get at market definition, I'm sorry, market power?

A Well, it's more than that. It's a way to get at market **[Page 148]** power and it's a way to changes -- in the context of mergers, it's a way to get changes in market power.

Q Okay. Another way to figure out whether there's market power, is to look at whether there are direct anticompetitive effects, right, of conduct?

A Yeah, another way is to do what's called direct analysis.

Q And is it the case, Dr. Teece, that in this case, for this case, you, yourself have done no empirical work?

A If by that, you mean have I done any econometrics, that is no, I have not done econometric studies. I have looked at a lot of empirical data.

Q Okay, you've not done any regression analysis yourself, for example?

A That's correct.

Q And Dr. Teece, I'd just like to end with a question about a particular piece of evidence, that I wonder if you have considered.

MR. BARNETT: And your Honor, it's an audio tape that we got from Comcast. Your Honor may recall that we requested the audio tapes some time ago and I've got a transcript that I'd like to hand to counsel and up to the Court.

(Pause.)

Q The question I have, Dr. Teece, is did you consider the interview of Larry Smith, who was the Executive Vice **[Page 149]** President of Comcast in June of 1996, before you formulated your opinions in this case?

A As I sit here right now, I don't remember specifically.

Q Well, let's listen to it and see if you can recall.

(Audiotape being played at this time.)

BY MR. BARNETT:

Q Dr. Teece, do you feel it would have been helpful for you to have known about that testimony of that interview before you rendered your opinions in this case?

A You know, I don't think there's anything deeply surprising in that. I don't think it's necessarily all that pertinent to the issues before this Court. After all, the reason SportsNet was there under Comcast's ownership before the class period.

MR. BARNETT: I pass the witness.

THE COURT: Why don't we mark the transcript, unless there's some objection to it?

MR. KORPUS: I do have an objection, your Honor. My objection is that it looks like this is not the

complete transcript. It looked like they gave you selected excerpts, am I right about that?

MR. BARNETT: Of course, it's an excerpt.

MR. KORPUS: But it looks like there's gaps in between, so, I don't know that this represents the full interview.

[Page 150]

THE COURT: The stars represent gaps?

MR. KORPUS: I think that's what it is.

MR. BARNETT: I don't think so, your Honor, but we can certainly clarify it.

THE COURT: Well, you guys can clarify it and if you have an exhibit, to that effect, you can mark it and send it.

MR. KORPUS: Yes, I mean, if it's the whole transcript, that's fine.

MR. BARNETT: The number, your Honor, is 62, that's the next number.

THE COURT: D-62, okay.

MR. BARNETT: Your Honor, I suppose I'd like to include an audio, the copy of the audio as well.

THE COURT: Sure.

MR. BARNETT: That will be 63. Your Honor, maybe this tape can be admitted, subject to any objection on clarification.

MR. KORPUS: Yes, we will -- we'll work it out.

THE COURT: Very good, thank you. It is admitted subject to whatever comes from the meeting on the exhibit.

REDIRECT EXAMINATION

BY MR. KORPUS:

Q Dealing with that Exhibit 62, first, we're going in reverse order. I see it's dated June 19, 1996. That's the date of the interview. Right, Dr. Teece?

[Page 151]

A Yes.

Q And that's before the allegations in this case, right?

A Correct.

Q And at that time, was DBS in the market?

A It was just starting, I believe.

Q Did they have local into local?

A No.

Q Was RCN in the market?

A I don't believe so.

Q Okay. Now, there is a reference on the tape and in the transcript to a sports purchase, do you know whether Mr. Smith was even talking about the acquisition of Comcast SportsNet?

A I don't know what he's referring to specifically.

Q Okay. You were asked about this chart, Exhibit 4 and whether it shows DBS or ABS and there is a footnote on the bottom showing that it is, in fact, ABS penetration, right, Dr. Teece?

A Correct.

Q And there's a question about whether or not it includes Fios. And there is a footnote on that in

your report that I'd like to take you to. In your first report, April 10th, Footnote -- it's on 80-something. I need to find it. Do you have the footnote there, Dr. Teece, that deals with this -- that goes with this exhibit?

[Page 152]

A The exhibit is on page 29, I believe.

Q No, I don't think that's the exhibit.

THE COURT: Exhibit 5 is on my page 29.

MR. KORPUS: I think that's a different exhibit. I'm looking for the DBS/ABS exhibit, your Honor, which is Exhibit -- oh, I'm looking at the wrong report.

THE COURT: Okay, we'll go to another report.

MR. KORPUS: May 6th report.

THE COURT: May 6th, yes, okay, what page?

MR. KORPUS: Page 33, my apologies, your Honor.

THE COURT: May 6, 2009?

MR. KORPUS: May 6, 2009, page 33. No?

THE COURT: No. Are we looking for a chart?

MR. KORPUS: No, I'm looking for a footnote that, I think, on page 34, you have the chart.

MR. SHUSTER: It's page, it's the May 6, 2009 report.

MR. KORPUS: Yes, I have it. It's page 34. I believe your Honor has the chart.

THE COURT: 34, we have the DBS --

MR. KORPUS: Chart.

THE COURT: Yes.

MR. KORPUS: And 33 has the footnote in it that describes the chart.

THE COURT: Very well. What footnote is that?

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MR. KORPUS: Footnote 80.

THE COURT: Got it, okay.

MR. KORPUS: It describes ADS refers to.

THE COURT: Yes, I see that.

BY MR. KORPUS:

Q Can you read that, please?

A Yes. ADS refers to reception of TV programming by a satellite. DBS or large dish. All are from satellite mast antenna systems, SMA TV, all are from multi-point distribution systems, MDS.

Q Does it include Fios?

A No.

Q Okay. Now, you were shown your first report, your April 10th report and certain studies referenced in that report, about DBS presence and cable pricing. Do any of those studies address the question of how DBS and how cable pricing would be affected if DBS penetration increased six or ten percent?

A No, none of them do that either at the national level or for Philadelphia DMA.

Q And your Honor asked whether that's the sum and content of your learning on the issue and I just wanted to point your Honor to your second report, your May 6th report, paragraph 67 through 71, where you addressed this issue in greater detail once

plaintiff actually came out of the closet and **[Page 154]** introduced the allegation into the case. Do you see that?

A Yes.

THE COURT: Yes, I do see it. It's Dr. Singer's presented no sound economic basis, et cetera.

MR. KORPUS: It stops there, your Honor.

THE COURT: It's in that section?

MR. KORPUS: Yes, in paragraph 69, your Honor, has bullet points on each of those studies and addressed them in detail once it actually became an issue in the case.

THE COURT: I'm marking it, thank you.

MR. KORPUS: Thank you, your Honor. Thank you, that's all I have.

MR. BARNETT: Nothing further, your Honor.

THE COURT: Thank you very much, Dr. Teece.

THE WITNESS: Thank you, your Honor.

THE COURT: Defendants?

MR. KORPUS: I think that's the end of our case.

THE COURT: Anything in rebuttal?

MR. GOLDBERG: Yes, your Honor, I'd like to call Dr. McClave to address two or three things that Dr. Chipty said. It shouldn't be more than 10, 15 minutes on direct examination.

THE COURT: Anyone need a ten minute break?

MR. KORPUS: Well, we could break, your Honor, but I really don't know if there's room for rebuttal.

We've been **[Page 155]** going back and forth in reports for some time now.

THE COURT: Well, that's true. That is true. What specifically do you want to talk about?

MR. GOLDBERG: Sure, Dr. Chipty state in her direct examination this morning, that in the study that was represented by now, the Plaintiff's Exhibit 61, that she, in fact, excluded zero prices. That is not correct and Dr. McClave will testify to that and how it impacts that study.

THE COURT: We'll hear it.

MR. GOLDBERG: Dr. Chipty also testified that discounts in the Philadelphia area were greater than discounts in the benchmark area and that's also not correct.

THE COURT: Well, you're going to offer testimony to that effect?

MR. GOLDBERG: That is correct, your Honor. It's directly rebutting what Dr. Chipty said.

THE COURT: Okay, fine. Well, we'll hear that, too. We're going to take a ten minute recess and we'll be back.

(Court in recess 2:20 to 2:32 o'clock p.m.)

THE COURT: Thank you, okay, we're ready to go. You may be seated. Mr. Goldberg?

MR. GOLDBERG: Your Honor, before we broke, the plaintiffs called Dr. James McClave.

THE COURT: Okay.

MR. GOLDBERG: I apologize for being out of the **[Page 156]** courtroom, your Honor.

THE COURT: All right. You can swear the witness again.

DR. JAMES T. McCLAVE, Plaintiff's Witness, Sworn.

THE DEPUTY CLERK: Please state your name and spell your last name for the record.

THE WITNESS: My name is James T. McClave, last name, M-c-C-L-A-V-E.

THE COURT: You may proceed, Mr. Goldberg.

DIRECT EXAMINATION

BY MR. GOLDBERG:

Q Dr. McClave, you were in the courtroom when Dr. Chipty testified this morning?

A Yes.

Q And you've read her reports?

A I have read all of her reports.

Q And you've responded to the criticisms that she made to her reports?

A I have.

Q She talked about in her direct testimony, that she had made criticisms of your overbuilding variable in the benchmark, do you remember that?

A Yes.

Q And she said that Dr. Williams had not responded to that revision, that re-specification?

[Page 157]

A I heard that.

Q Did you respond to the re-specification?

A Yes, we responded, in no uncertain terms, that we disagreed with her overbuild re-specification.

Q And that was in one of the reports that you filed in this case?

A It was, one or more.

Q Do you remember which report it was?

A Mr. Goldberg, I'd want to check before stating for sure. I have four reports, as well.

Q Thank you.

THE COURT: Well, let's check and get it down.

MR. GOLDBERG: All right.

THE COURT: Let's see which report were talking about, so we have it together.

MR. GOLDBERG: Sure. You're absolutely right, your Honor. He's on the stand, let's do it right.

(Discussion off the record.)

Q Will you take a look at your class cert report? I've got one for you, Dr. McClave.

A All right, his Honor gave me one, I'm good.

Q Okay, great.

THE COURT: I'll take one of them back. This is one?

MR. GOLDBERG: You might try your class cert book.

[Page 158]

THE COURT: Okay. It's Tab 3 in my binder.

THE WITNESS: Mine, too.

Q That would be your own class certification reply declaration of Dr. James McClave?

A Fine, okay.

Q And I'll direct your attention to page 5, Dr. McClave?

A Yes, that's Section 3.2, your Honor.

Q Would you read into the record what you said in your report, Dr. McClave?

A I said, the title of the section is, Dr. Chipty inappropriately defines the overbuilder status. And it reads, "In her class certification declaration, Dr. Chipty specifies a regression model to estimate the effect of overbuilding on price. In doing so, she adopts a different definition of the overbuilder status of the county from the definition that I employ in my regression mode. And particularly, when subscriber information is missing, she imputes values for the missing subscriber information by using the national median number of subscribers per census block group for the cable company in question. And if the result is still missing, she uses the national median across all cable companies. The result is to significantly increase the number of overbuild counties in the benchmark."

Q Let me stop you for a second. What is the effect of increasing the number of overbuild counties in the benchmark?

[Page 159]

A What we found was that she was including places that weren't actually substantially overbuild and so it, in effect, waters down the ability to find out what effect overbuilding has on price.

Q It would reduce the co-efficient?

A It would reduce the weight or the co-efficient on the overbuilding --

Q Right.

A -- as she showed in her models.

Q Go ahead, go on.

A "The problem is the definition of overbuilding is dependent on reasonably reliable subscriber counts. Since I required that two or more cable companies have, at least, 15 percent of the subscribers in franchises that were indicated to be overbuild. Using a national average for missing counts is not likely to produce a reliable enough indicator of the true value for an essential part of the overbuilder definition. Especially for overbuilt counties where national averages, that include mostly non-overbuilt counties, are particularly inappropriate."

Q That's it, thank you, Doctor. In her report that you are responding to here, did she disclose clearly that she had also changed your specification in the Philadelphia benchmark by turning off your dummy variables on rebuilt dummy variables in four of the five counties?

[Page 160]

A I could find nothing in her report that indicated she had done that.

Q Did you discover that she had, in fact, done that?

A Yes.

Q How did you discover that?

A By looking at the computer code that she used to run her regression model.

Q And what does the computer reveal?

A It indicated that she had assumed or left on the overbuilder variable in only Delaware County and had turned it off in the other four, Bucks, Montgomery, Philadelphia, I believe the other one's Chester. I've forgotten exactly. But she turned it off in the other four in which I had turned it on.

Q Well, what is the effect of turning off the dummy variable in the other four counties for the purposes of calculating damages?

A It will lower the damage estimate.

Q And was there a way in which you could check your reading of her computer code, to assure yourself that, in fact, that is what she had done?

A Sure, I could run her computer code to make sure that it replicated what she put in her report and then, I could go back and turn those four overbuilder variables back on and see what effect it has and that's what I did.

[Page 161]

Q You used the word replicate her results. The replication of another expert's empirical results, is that something typically that an empiricist does?

A In my case, I always do it.

Q And you do it all of the time?

A If I can't do it, I complain to the lawyers that I don't have enough data, but yes, I attempt to replicate in every case.

Q Is that the first thing that you do when you get an opposing expert's work?

A Yes.

Q And not just in this case, in all cases?

A That's right.

Q Let's then turn to the next issue. Dr. Chipty testified that -- do you have Exhibit 62, Plaintiff's Exhibit 62, which is the corrections of Dr. Chipty's Exhibit U to --

A I think it's 61.

Q Oh, I'm sorry, 61. Do you want another copy, your Honor?

THE COURT: No, I have it here.

(Pause.)

Q Plaintiff's Exhibit 61, Dr. McClave, you sat through the testimony, is the correction, the Infotech correction to Dr. Chipty's slide U on Defendant's Exhibit 71. Do you have that in front of you? You did, but you don't now?

A I don't now. I don't remember what the letter was.

[Page 162]

Q I'm going to give you mine and I'll get another one. Was that done under your direction by the Infotech folks?

A Yes.

Q When we were discussing Dr. Chipty's Exhibit 71, Slide U, did you hear Dr. Chipty testify that when she ran that as far as the per calculation of average prices, she didn't want to quibble with you an-

ymore about using zeros and all the other things and so, she, this time, did not include zero prices in?

A I heard that.

Q Was that correct, to your understanding?

A No, it was not.

Q How do you know?

A Again, I replicated this result and the only way I could replicate it was by leaving zero prices in the data, in the model.

Q And under your direction and supervision, did you have somebody from Infotech check the computer code?

A I did.

Q And what did the computer code reveal?

A That zeros were still part of these averages that are used in this model.

Q And is it correct that the computer code says that if you see a blank, put in a zero?

A Yes.

[Page 163]

Q And if you see three digits, take it out, because that's an outliner (ph)?

A It doesn't quite go like that, but it, in essence, removes very large prices due to seasonal buys.

THE COURT: How does that affect the result? Just explain that to me.

MR. GOLDBERG: Sure.

Q What is the effect of her leaving -- with specific reference to Exhibit 61. Would you explain to the Judge what the effect of leaving zeros is?

A Your Honor, for example, the Cape May, that you see, you probably don't recall this, but I actually made a point of Cape May in my direct, of saying people --

THE COURT: I do recall that.

THE WITNESS: Oh, thank you. That people buy seasonal packages there.

THE COURT: Right.

THE WITNESS: Pay in advance and then they get a bunch of accounting entries that are zeros.

Q Who lives in Cape May largely?

A My understanding is folks that have sort of second homes and are there in the summer.

Q And so, go ahead.

A So, if you take out the zeroes, your Honor, for at least, 2003 through 2006, the pre-Triple Play years, all those **[Page 164]** things end up being positive. So, and there are others in here, but Cape May is the best example of what the zeroes do.

Q So, in fact, leaving the zero prices in, which you criticized from day one, leaving the zero prices in doesn't look like you have an impact on Exhibit 61?

A Most definitely, yes.

Q Then turn to the years 2007 and 2008, where there are a plethora, as Dr. Chipty alters your model. In fact, let's step back for a second. If she had not altered your model and she had run your

model and shown all of these counties for all of the years, what would be shown there?

A All the shaded areas changed from minus to plus, if I understand your question. If she hadn't altered my overbuilder variables, what you've shown shaded here on this exhibit --

Q Not just here, if she had not put in her population density variable and she had left in the prices as you had, what would be shown there?

A All pluses.

Q And isn't that -- isn't it correct, Dr. McClave, that your model showed all positive damages, in all counties, in all years?

A Correct.

Q That was the basis for your comment impact opinion?

A It was.

[Page 165]

Q All right, so, in order to find minuses, she had to leave in the zeroes, which she said she did not do. She had to alter your overbuilding variable in the benchmark area, which she failed to disclose. She had to change the sign on your dummy variables for overbuilding in the Philadelphia area, which she failed to disclose?

A That's all correct.

Q And she had to add the population density and she had to use her averages?

A All correct, yes.

Q Is there anything else --

THE COURT: Excuse me a second. Doctor, I'm going to ask you to repeat. You have done this once before, I want to hear it again, very, very briefly, so I can put it within the context of what we're talking about now. And that is the reasons why you were critical of the doctor adding population density and the reason why you didn't do it?

THE WITNESS: Okay, your Honor, the population density variable, I believed going in, based on reading in the FCC and all the studies that are out there, that say, it ought to have a negative relationship to price. That as clustering increases, as population density increases, there tends to be an increase in clustering and the average cost goes down. You're spreading the cost over a larger number of subscribers, as Dr. Chipty admitted.

[Page 166]

THE COURT: But have you cited, in your report, the authority that you've just referred to, with respect to population density?

MR. GOLDBERG: May I follow-up on a little bit of that?

THE COURT: Yes.

Q Is it not correct, Dr. McClave, that numerous federal studies, FCC studies, GAO, FTC studies indicate that population density is correlated just with the effect that you described?

A Yes.

THE COURT: And have you cited them in your report?

THE WITNESS: I believe I have, your Honor.

THE COURT: Well, I want you, right now, while I'm fresh, to tell me where it is in your reports.

THE WITNESS: All right.

THE COURT: We've got so much material here, we're going to need --

THE WITNESS: I agree.

THE COURT: -- as much help as we can get.

(Pause.)

MR. GOLDBERG: Some of this time, your Honor, is going to have to count against you, rather than me.

THE COURT: It does, absolutely.

(Pause.)

[Page 167]

THE WITNESS: Well, your Honor, I know that I have cited all the FCC and GAO reports, which I read and Appendix B documents relied upon.

THE COURT: Yes, but I don't want to have to read all of them --

THE WITNESS: I understand.

THE COURT: -- if you can find this particular point.

THE WITNESS: I understand. And I honestly, your Honor, don't remember whether I cited the particular -- that there were a number of them. I don't know whether I cited them or not in the reports.

MR. GOLDBERG: Your Honor, again, your Honor has the reports, I'll make reference, at least, a proffer, make reference to the reports themselves.

THE COURT: We're talking about the reports that cover population density?

MR. GOLDBERG: That's right. The FCC report on cable industry prices, 2009, page 82. The GAO, October, 2002 report, page 35. The FCC report on cable industry prices, 2006, page 30. The FCC report on cable industry prices, 2002, page 16. And then page 738, from an Emmons and Prager (ph) economics text, from 1997. Other than the Prager and Emmons text, all those reports, I believe, your Honor, are in evidence. And if your Honor desires, we will compile all of **[Page 168]** those in a package for you.

THE COURT: We so desire.

MR. GOLDBERG: That's great.

THE COURT: I do, I want it to be compilation which has the approval of defense counsel.

MR. GOLDBERG: Great.

THE COURT: Okay.

MR. KORPUS: I think both of the exhibits that I showed to Dr. McClave on cross.

THE COURT: It's probably there.

MR. GOLDBERG: Some of them --

THE COURT: I don't want to --

MR. GOLDBERG: Some of them are.

THE COURT: -- I want it made easier for me on that issue.

MR. GOLDBERG: Sure, absolutely.

BY MR. GOLDBERG:

Q Let me turn now to a couple times, Dr. Chipty stated in her preface to her answers, both to

Mr. Shuster's questions, my questions and I believe, the questions from his Honor, that such and such would be correct so long as discounting was greater in the Philadelphia area than it was in the benchmark area. Do you remember her prefacing certain answers that way?

A Yes, I do.

[Page 169]

Q And then, in response to redirect examination by Mr. Shuster, not in her reports, not in her direct testimony. But in redirect, in response to one of the questions, Dr. Chipty testified that she knew that there was more discounting going on in the Philadelphia area than in the benchmark area. Do you remember hearing that?

A I do.

Q Before I get to that, I want to step back for a second. You remember exhibit -- there's a lot -- there's a lot of -- by Exhibit S and what is shown. And that was the one --

A Yes.

Q That's this one, your Honor.

THE COURT: Okay, yes.

Q Do you remember this?

A I do.

Q That's 2008?

A Right.

Q Right and the blues, the blues along the top here show the discounting, right?

A Yes.

Q Okay, is 2008 representative of what has gone on as far as discounting is concerned, across the class period, which stretches from 2000 to 2009?

A No, sir, it's very atypical.

Q What is -- in 2003, you don't have data, yourself, nor **[Page 170]** does Dr. Chipty for 2000, 2001, 2002. Starting in 2003, what does the blue look like on a chart like this, is it noticeable?

A You can barely see it. In some places, you can't see it. There's almost no discounting in 2003 --

Q How about 2004?

A Same answer.

Q 2005, getting a little bit larger?

A A little, not much.

Q 2006?

A Still not much.

Q 2007?

A That's the first year you start to see what I call the Triple Play effect.

Q What is happening in 2007 and 2008, Dr. McClave?

A There is inclusion in those average prices of prices that people didn't actually pay. Namely, the arbitrary allocation of the $33 Triple Play price.

Q Remind the Judge and I apologize, your Honor, if I'm covering something that you already have. But remind the Judge of what Dr. Chipty included as the price for expanded basic service for Triple Play?

A $33.

Q To your knowledge, did anybody pay $33 for expanded basic service?

[Page 171]

A To my knowledge, no.

Q What did you do with respect to Triple Play? Did you include Triple Play in your calculation of damages?

A Only in the revenue aspect, not in determining the appropriate benchmark against which to compare.

Q But in your opinion, as somebody experienced in specifying multiple regression models for these purposes, would it have been appropriate to include Triple Play prices in that type of estimation exercise?

A No, in my judgment, it would not.

Q What does the inclusion of Triple Play do for showing those larger bars of discounting in 2007 and 2008?

A In my judgment, it tends to overstate the degree of real discounting, discounting to prices that people actually are paying.

Q If you exclude zero prices and you exclude Triple Play, what do you determine with respect to the comparison of discounting in the Philadelphia DMA, as opposed to the benchmark areas across the entire class period? Recognizing, again, that you don't have data for 2000, 2001 and 2002?

A From 2003 to 2008, the degree of discounting in the benchmark, exceeds that in Philadelphia. If you exclude zero prices -- if you exclude prices that

people aren't actually paying, zeros and Triple Play prices.

Q Did you prepare a chart to help explain this to the **[Page 172]** Judge?

A Yes, sir.

Q I'm going to show you what we marked as Exhibit 64. have one for your Honor, I believe the defendants have one and I'll get one for your Honor's law clerk.

THE COURT: Okay.

Q What is Exhibit 64, Dr. McClave?

A Exhibit 64 has a pair of bars, your Honor, for each year. The red bar shows -- actually, this is comparing list prices in the two areas, Philadelphia versus benchmark and average prices after excluding Triple Play and zeroes. And you can see in the benchmark, in each and every year, average prices have greater percentage price elevation, than does the list price. So, the fact that the blue bars in every year are greater than the red bars, means that my use of list prices was, if anything, conservative.

Q In her direct examination, Dr. McClave, Dr. Chipty testified and showed the Court, I don't know, a half a dozen slides dealing with what she calls urbanicity and the lack of urbanicity in your benchmark area?

A Yes.

Q Have you checked to determine whether the claimed lack of urbanicity in the benchmark area, has an effect on your damages?

A Yes.

[Page 173]

Q And what did you find?

A Well, for one thing, your Honor, she talked about not including, for example, Minneapolis and Denver and some other places that were densely populated. And so, I've gone back and put those in the benchmark, despite that fact that I don't agree with it. And as expected, as I expected, the damages are decreased somewhat, but they're still substantial and there's still every county, every year. They're in the, typically, in the 800 million range somewhere. And so, the inclusion of those densely populated areas that she cited, once you test it, you know, as an empiricist, I want to see what the effect is. Don't just tell me that I excluded them. I thought I had good reason to exclude them, but what effect did they have? And every test that I ran, up to and including, I think she listed the top 10 DMAs, Philadelphia was number three. And I included the densest populated county in each of those ten, other than Philadelphia and the damages were still substantial and impact was classwide.

Q Above 800 million?

A Yes.

Q And finally, Dr. McClave, you sat through the testimony of Dr. Teece about common impact and (inaudible). Is there anything that has been stated that in any way, shapes or causes you to retreat from your position that your multiple regression model showing overcharges in every county, for **[Page 174]** every year, shows common impact?

A Its still my judgment that it does show common impact.

Q Thank you.

MR. GOLDBERG: Pass the witness, your Honor.

CROSS-EXAMINATION

BY MR. KORPUS:

Q Okay, so, you know, Dr. McClave -- good afternoon, by the way.

A Good afternoon.

Q So, now you added certain counties back in, dense counties. You ran your model and you say, there's a bit of an effect, but not much of an effect, right? But you still didn't include the density variable, right?

A Right, I --

THE COURT: You have not included the population density variable in anything that you've done, either originally or in checking on --

MR. GOLDBERG: He's testified to that.

MR. KORPUS: Are you testifying?

MR. GOLDBERG: I'm sorry, I'm sorry.

THE WITNESS: That's not true, your Honor.

THE COURT: Okay, then correct me on that.

THE WITNESS: In fact, if I can go to the board, it's right behind that.

THE COURT: Sure, okay.

[Page 175]

THE WITNESS: Your Honor, this is my model with population density added, damages are $650 million or so, every county, every year. The only reason I excluded it is I had the wrong sign. I thought it was tainted by what's being complained about in this case. That's it.

BY MR. KORPUS:

Q I was asking specifically about the model -- you can sit down. I was asking specifically about the model adding Minneapolis and those other things. And on that one, you did not include population density?

A Correct.

Q Okay, now, going to this one here, that you just took his Honor to, I won't comment on the -- but if you also -- if you also control for this, the way that Dr. Chipty did and just those two things, you don't get damages in every year and every county, right? And your Exhibit 61 shows that?

A I think you have to actually use average prices that include zeroes and Triple Play. But if you do that, then that --

Q Use the average prices and the population density and that alone and forget about overbuilding and forget about zero pricing. Average prices on your model and density, those two things, you do not get damages every year, every county?

A Mr. Korpus, you're asking me to forget about things that **[Page 176]** make a difference.

Q I'm not --

A The overbuilding variable does make a difference. The inclusions of zeroes do make a difference. So, you have to be more specific --

Q I don't think --

A Okay.

THE COURT: Counsel's asked his direct question. If you can answer it, please do, directly. We're

not going to assume that you're going to promote that position.

THE WITNESS: Okay --

BY MR. KORPUS:

Q I asked you just exactly the opposite. I think you're misunderstanding. I'm saying take your overbuilding. Take your zero prices. Change only two things to the model. Add in population density, okay? Use average prices, okay? Those two things. You do not get damages every year, every county.

A I believe you do if your average prices don't include zeroes or Triple Play. I believe if you include one or both of those, you do get negative numbers.

Q Okay, so now I want you to do it average prices with Triple Play, forget the zero ratio. The zero ratio is not all of that significant. It doesn't show a huge amount of damages, right?

[Page 177]

A It's pretty significant to people in Cape May, yes.

Q Okay. But on the whole, for the whole class, the difference in damages doesn't change that much based on whether you include zeroes or don't include zeroes, right?

A It depends on the location, yes.

Q I'm talking about the total analysis.

A Okay.

Q For the total analysis it's not a huge issue. It's not like the population density issue where we're talking about hundreds of millions of dollars in difference, right?

A I haven't measured it by itself, but I would doubt it's that big.

Q So now you take just population density and you take the average prices, but you include the Triple Play. I mean include the effect of Triple Play, okay?

A Okay.

Q But not the zeroes. You don't get damages every year, every county, right?

A I'm not positive sitting here, but it wouldn't surprise me if you didn't. Especially in the last two years.

Q Okay, so let's talk about your assumption that Triple Play should not be included. And by the way, you say just in the last few years, but you agree with me and we covered this in your cross. You said that there wasn't that much discounting in the beginning, there's a lot more towards the **[Page 178]** end. But you agreed with me that over the class period, on average 20 percent of the class received discounts, right? If you look at the whole class period.

A I agree with that. Most of it coming in 2007 and '8.

Q Right, right. But on average 20 percent.

And the question of Triple Play. When you say that it's not right to take Triple Play into account, I want to understand what you did. You didn't just take the customers -- the customers who were receiving Triple Play. You didn't just take them and exclude them from the calculation, exclude them from the class, not seeking damages from them. You included them in your model, but you're just assuming

that instead of paying Triple Play they are paying the model price, the list price, right?

A No, no, not at all.

Q So what are you --

A When I compute the damages, I assume they're paying $33, but I take whatever the percentage benchmark said was the difference, ten percent say, between the list prices and assume that that price would have been ten percent lower. So I don't move them up to any higher price.

Q For the purpose of calculating impact, for the purpose of calculating your overcharge, for the purpose of coming up with your 13 percent alleged overcharge here that plaintiffs are relying on for impact, for that purpose, right, those **[Page 179]** people you're assuming are paying the model price?

A No, I disagree.

Q You did not include -- do you take them out of the class?

A No.

Q If we look at a franchise area where there's a thousand people paying -- taking Triple Play, right?

A Okay.

Q Did you assume that they paid Triple Play, or did you assume that they paid some other price?

A I assume they paid Triple Play for the purpose of calculating damages.

Q And for the purpose of calculating impact, what price went into your model for that franchise?

A The estimate would have been whatever the percentage difference I found for that place in list price. So if the list price were 10 percent too high, super-competitive --

Q That's the price you put in.

A -- then I would have applied the 10 percent to the $33.

Q Right, that's the price you put in.

A That's right. Not the list price, I didn't assume the list price. I assumed that the impact would have been 10 percent to those customers as well.

THE COURT: Doctor, before I lose this thought, this goes with my glossary of terms, on the issue of price we've been using a lot of labels. We have discount price that's **[Page 180]** been used, average price has been used, model price has been used and list price has been used. Okay. And what I want to know is how you have used those terms. What the meaning was that you gave to each of those terms and which terms match the studies that you did.

THE WITNESS: All right. Let's start with list price.

THE COURT: Okay.

THE WITNESS: List price, your Honor, is a price, I think we've talked about rate cards. It's called the a la carte price for the expanded basic service. It's what you pay if that's all you get and you're not getting some sort of deal. So it is just what it sounds like. It's the retail price of expanded bases. And I attempted at every location to determine what that was.

There was a discussion today about well, that might be the model price. It usually is. It's usually the price that most people pay in 2007 and '8 --

THE COURT: What's your understanding of the term modal price?

THE WITNESS: Modal price is a statistical definition. It's the price in any given area, say franchise, that more people are paying than any other. The problem -- well, that's what it is.

THE COURT: Discount price.

[Page 181]

THE WITNESS: No, usually it's list price. Until Triple Play comes along --

THE COURT: What's your meaning of the term discount price here?

THE WITNESS: Discount price is some price less than list, it's a discount off of list. And my definition, your Honor, is a discount price is a price somebody pays, not a price that the company arbitrarily assigns.

THE COURT: An actual price?

THE WITNESS: An actual price.

THE COURT: All right.

BY MR. KORPUS:

Q The people taking Triple Play are paying $99 for three services, right?

A Correct.

Q Video, Internet and phone, right?

A Right.

Q And a third of 99 is $33, right?

A I'm sorry?

Q A third of 99 is 33, right?

A That's correct. That's good math.

Q And that's the price -- don't need an economist for that one.

And that's the price that Comcast allocates for those customers taking Triple Play, right?

[Page 182]

A That's right.

Q And in your model you did not use that price for those customers.

A In modeling list price I did not use the $33 price, that's right.

Q And you know, by the way, you were here when Steve Burke testified, right, the CEO of Comcast?

A Actually I was not here during his testimony. I missed it, I'm sorry.

Q I wish you could be here. Well, Mr. Burke testified that 25 to 30 percent of the class take Triple Play. Is that consistent with your findings?

A I certainly see a lot of it in 2008. It wouldn't surprise me if it's 25 or 30 percent. That's probably right. He should know.

Q Okay. Now, we talked about density and we talked about the binder that's going to be presented to his Honor with all of the support for using density in the studies. Let's talk about what the studies show. Those studies show regressions done by the

Government and by academics which include a variable for density, right?

A Many of them do.

Q Well, the ones that are going to be submitted, presumably, that's what they'll show.

A I would think most of them will show that, yes.

[Page 183]

Q And those variables in some cases have a negative correlation, and in some cases an insignificant correlation, right?

A In most cases its either negative or insignificant.

Q Right. But they're still show in the analysis, they're shown in the regression and they're included as part of the analysis, right?

A Yes.

Q Okay. And in your analysis it's not included, right?

A Correct.

Q And in your analysis it's significant, right? Very significant.

A It's positive and statistically significant.

Q Yes, causing hundreds of millions of dollars differences in the model.

A True.

Q Okay.

You mentioned that Dr. Chipty didn't mention in her report that she changed the overbuilding assumption, that you got that from the backup, right?

A I think what I said was in the part as far as Philadelphia was concerned, the five county assumption I made, the fact that she switched it to one county I could only find in the backup materials. I could not find that in her report.

[Page 184]

Q And a lot of information that you gave to us that was pertinent could only come from the backup and wasn't in the report, right?

A I think that's for you to decide, what's pertinent and what isn't.

Q Well, how about the fact that in taking prices you introduce certain screens such as the screen saying you don't take, even if the model price -- you don't take the model price if it's more than 25 percent less than the year before, you take the second price, or that you don't take the Triple Play. I don't think that's in your report. I believe that's all in the codes in your backup, right?

A I think the Triple Play assumption is clear in the reports.

Q Your first report, the one that introduced a regression. You're saying it's in there? Because I looked and I can't find it.

A I think what I said was I tried my best to determine what list price was. The details of how I did that are certainly in the backup materials because it's not simple. I mean especially in 2007 and 2008, your Honor, you can look at a franchise and you really have to go to the rate card to see what the

a la carte rate price is. So it wasn't something that -- and I did give the rate cards as backup material. But in each and every case, no, I didn't tell you exactly how **[Page 185]** I got every price that was in the backup.

Q And the fact that you introduced a screen, an arbitrary screen that says if the price is down 25 percent, I'm not going to take the model price, I'm going to take the second most common price. Was that anywhere in your first report that introduced the regression, or was that in the backup?

A It may have been in the backup. I don't recall.

Q Okay. And one last point. This question about whether or not Dr. Chipty used the zero prices in coming up with the plus and minuses, and I understand you've had people look at it. Did you look at it yourself?

A Yes.

Q You did. Okay. Because I want to show you what Dr. Chipty says. This is in the May 6th report.

MR. KORPUS: May I approach, your Honor?

THE COURT: Yes.

BY MR. KORPUS:

Q Let's turn to page 45.

THE COURT: May 6th report, page 45?

MR. KORPUS: Page 45, your Honor.

Q And it's paragraph 92, Roman one there.

A Okay.

Q First I have replaced Dr. McClave's list prices with weighted average prices computed using his own computer programs. That's what Dr. Chipty says, that she just took **[Page 186]** your average price. Do you recall that in the backup you gave us you had an algorithm amount to calculate average prices, right?

A Yes.

Q You had one in there, you looked at that?

A We had to do average prices, your Honor, because that's how we got revenue. In other words, I did list prices as you well know by now.

THE COURT: Yes.

A To get the overcharge.

Q Okay.

A But then I was going to apply it to revenue and revenue takes into account discounts, so I had to look at discounts. That's why I was in there. Not because I modeled on it, but because I calculated revenue using it.

Q And that calculation and algorithm that was lifted from your backup, did that include zero prices?

A It did.

Q Okay, so she just used what you used?

A That's absolutely right. She used what I used, but she mischaracterized it.

MR. KORPUS: All right. I have no further questions, your Honor.

MR. GOLDBERG: Your Honor, I have one thing that if it will help your Honor I would do. Your Hon-

or asked about **[Page 187]** Dr. McClave's definition of various prices, and we actually have, which we didn't use as an exhibit, a rate card. And the rate card might help your Honor, if you want it.

THE COURT: Show it to counsel.

MR. GOLDBERG: Sure.

MR. KORPUS: I think I've seen it already.

If they want to submit a rate card into evidence, I have no objection.

THE COURT: Mark it and we'll receive it without objection. The rate card is what? Plaintiff's --

MR. KORPUS: It should be 65.

THE COURT: It's admitted.

(Exhibit P-65 admitted into evidence.)

THE COURT: Are we done with Dr. McClave?

MR. GOLDBERG: If it will help your Honor, I was going to ask Dr. McClave just to explain what's on the rate card, but I don't want to belabor this.

THE COURT: Well, let me see the rate card.

MR. GOLDBERG: All I was going to do is have Dr. McClave point out the particular price values on this two-page rate card that apply to . . .

THE COURT: Yes, you can proceed.

MR. GOLDBERG: I'm going to mark it --

THE COURT: It's Plaintiff's Exhibit Number 65 which is admitted.

[Page 188]

REDIRECT EXAMINATION

BY MR. GOLDBERG:

Q I'm going to show you what we marked as Exhibit 65. Would you tell Judge Padova what Exhibit 65 is.

A This is a rate card, your Honor, that says price schedule effective April 1, 2007.

Q Would you point out to the Judge where Triple Play appears on the rate card?

THE COURT: I see it, starter Triple Play bundle.

A That's right, your Honor.

Q And anywhere on the rate card does it says $33 for the enhanced basic component of the rate card?

A I don't see $33 anywhere on either page.

Q Would you point to the Judge where the a la carte that you referred to in your previous testimony, where the a la carte prices are?

A At the bottom, your Honor, it says -- bottom of the first page -- monthly a la carte on the right. Cable services additional tiers. And you'll see, your Honor, there it says basic service, 11.40. Expanded service, 34.65. And Value Pack, which you've heard called B-3 by me and others, I think, you would add those three together to get the total expanded basic a la carte or list price, and that's what we would have used in our modeling process.

Q Would you turn to on the left, Italicized merited. Do **[Page 189]** you see that, Dr. McClave?

A On the first page?

Q Yes.

A I do.

Q One of the components of Triple Play is the telephone even, the voice over internet. Do you remember that?

A I do remember telephone is a part of Triple Play, yes.

Q Look down about an inch and a quarter where it says digital voice service. Do you see that?

A In the long paragraph?

THE COURT: Digital voice services provided by another Comcast company it says.

Q Do you see that, digital voice?

A Yes. I'm there finally.

Q Does that indicate what the price is for the voice part of Triple Play?

A Yes.

Q Go up to the sentence that says two-year term required, and read that into the record.

A Two-year term agreement required. $150 only --

THE COURT: Early.

A -- early termination -- boy, I'm having trouble reading this. Fee applies if any service is cancelled or downgraded during the two-year period except during the first 30 days following service activation.

[Page 190]

Q And read the all caps. You don't have to yell.

A After the two-year period, Comcast's regular charges apply unless service is cancelled.

Q Thank you, Dr. McClave.

MR. KORPUS: Your Honor, I just wanted to submit those advertisements, D-87.

THE COURT: It's D --

MR. KORPUS: 87.

THE COURT: Thank you.

Anything further of the witness?

Mr. Goldberg, anything further of the witness?

MR. GOLDBERG: Yes, your Honor. I believe that subject to some sort of out-of-court negotiations between the defense counsel and plaintiff's counsel, Plaintiff's Exhibit 63 is without objection --

MR. KORPUS: No, I thought what we're going to do is submit a transcript of the whole thing.

MR. GOLDBERG: And the audio.

MR. KORPUS: Well, you can't submit the audio, but we are going to submit separately transcripts so that his Honor has the whole --

THE COURT: Very well.

MR. KORPUS: -- to make sure nothing is taken out of context. You want to receive these now subject to that, I know.

* * *

List of Publications Discussing Population Density

FCC Studies

1. *Report on Cable Industry Prices*, MM Docket No. 92-266, FCC 02-107 (released on Apr. 4, 2002) (2002 FCC Price Report) (not offered or admitted but listed in McClave Corrected Decl., at App'x B (Documents Relied On), p. 1).

   - "Our price equation hypothesizes that monthly rates (which are used as a proxy for the price of cable service) are . . . inversely related to population density (since costs and therefore prices may be lower in areas with higher population density). . . ." (2002 FCC Price Report, at 16-17.)
   - "Both the number of system subscribers and the population density of the areas served have no measurable effect on monthly rates." (2002 FCC Price Report, at 18.)
   - In Attachment D-2 (Three-Stage Least Squares Estimation Results for Demand, Price and Quality Equations), which "shows the results of [the Commission's] three-equation structural model," under the heading "Price Equation: Log of Average Monthly Rates" the variable for the logarithm of population density shows a parameter estimate of -0.003 and a standard error of 0.008 as the results meaning that the relationship between population density and price is not statistically significant. (2002 FCC Price Report, at 29-30.)

2. *Report on Cable Industry Prices*, MM Docket No. 92-266, FCC 06-179 (released on Dec. 27, 2006)

(2006 FCC Price Report) (not offered or admitted but listed in McClave Corrected Decl., at App'x B (Documents Relied On), p. 1).

- "[P]opulation density can represent both a cost and a demand factor. A more densely populated area may suggest higher demand for cable services and therefore higher cable prices. It is possible, however, that a densely populated area may be part of a large city, which may have competing forms of entertainment available to consumers, which in turn may lead to lower demand for cable. Higher density, however, can also mean lower construction costs per home passed, which may lower the cost of providing cable services." (2006 FCC Price Report, at 30.)
- "All of the estimated regression coefficients have the sign that was expected, and, except for median income and local-into-local, are statistically significant at a 99% confidence level." (2006 FCC Price Report, at 32.)
- In Table IV (Regression Estimation) the variable for population density shows a parameter estimate of 0.026 and *t*-statistic of 4.65 meaning that the relationship between population density and price is positive and highly statistically significant at the .01 level. (2006 FCC Price Report, at 32.)

3. *Report on Cable Industry Prices*, MM Docket No. 92-266, DA 09-53 (released Jan. 16, 2009) (2009 FCC Price Report) (Defendants' Exhibit 2 (admitted 10/14 Tr., at 16:11-13)).

- "The 'density' variable represents a cost factor. In higher density areas, fixed costs are

spread across a greater number of households. Given cable operator behavior in clustering around major metropolitan areas, it is likely that economies of scale are associated with clustering, and thus that economies of scale overwhelm the marginal cost associated with serving more customers in higher density areas. This would be represented by a negative sign on the density coefficient." (2009 FCC Price Report, at 82.)

- In a table, called "First Regression Estimation: Includes Both Incumbent and Overbuilder in Overbuilt Markets," the variables for the logarithm of population density and the logarithm of population density squared show parameter estimates of -0.000 and 0.000 respectively with t-statistics of 0.21 and 0.03 respectively meaning that both the relationship between population density and price and the relationship between population density squared and price are not statistically significant. (2009 FCC Price Report, at 85.)

- In a table, called "Second Regression Estimation: Includes only Incumbent Observations in Overbuilt Markets," the variables for the logarithm of population density and the logarithm of population density squared show parameter estimates of -0.000 and 0.000 respectively with t-statistics of 0.87 and 0.69 respectively meaning that both the relationship between population density and price and the relationship between population density squared and price are not statistically significant. (2009 FCC Price Report, at 85.)

- "A negative coefficient for the density variable indicates efficiencies with increasing density, resulting in lower prices. The positive coefficient for density squared, however, indicates that this relationship bottoms out at some level of population density. It may be that it is very expensive to maintain a system in the highest-density areas such as in major cities." (2009 FCC Price Report, at 86.)
- "The density variables have the expected signs, but are not statistically significant." (2009 FCC Price Report, at 86, n. 30.)

GAO Studies

4. *Issues in Providing Cable and Satellite Television Services*, GAO-03-130 (October 2002) (2002 GAO Report) (Defendants' Exhibit 13 (admitted 10/14 Tr., at 20:22-24)).
   - In Table 1 (Expected Effects of All Explanatory Variables on Cable Prices and DBS Penetration Rates), which "present[s] the expected effects of all the explanatory variables in the structural model on cable prices," under the heading "Expected effect on cable prices" the variable for population density provides that, "[b]ecause more customers can be served per mile of cable, areas with higher population density should have lower costs of operation and therefore lower cable prices." (2002 GAO Report, at 32-35.)
   - In Table 3 (3SLS Model Results), which "includes the estimation results for each of the four structural equations," under the heading "Cable prices equation" the variable for population density shows a parameter estimate of

-0.0098 and a P-value of 0.0819 as the results meaning that the relationship between population density and price is not statistically significant at the .05 level (but the relationship between population density and price is negative and is marginally significant at the .10 level). (2002 GAO Report, at 42-44.)

5. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (October 2003) (2003 GAO Report) (not offered or admitted but listed in McClave Corrected Decl., at App'x B (Documents Relied On), p. 1).

   - In Table 3 (Three-Stage Least Squares Model Results), which "includes the estimation results for each of the four structural equation," the variable for population density shows a parameter estimate of -0.0120 and a P-value of 0.0256 as the results meaning that the relationship between population density and price is negative and statistically significant at the .05 level. (2003 GAO Report, at 57-60.)

6. *Direct Broadcast Satellite Subscribership Has Grown Rapidly but Varies Across Different Types of Markets*, GAO-05-257 (April 2005) (2005 GAO Report) (Defendants' Exhibit 3 (admitted 10/14 Tr., at 18:6-8)).

   - In Table 3 (Three-Stage Least Squares Model Results), which "includes the estimation results for each of the four structural equations," under the heading "Cable prices equation" the variable for population density shows a parameter estimate of 0.0015 and a P-value of 0.8090 as the results meaning that

the relationship between population density and price is not statistically significant. (2005 GAO Report, at 30-32.)

Academic Studies

7. William Emmons III & Robin Prager, *The Effects of Market Structure and Ownership on Prices and Service Offerings in the U.S. Cable Television Industry*, The RAND JOURNAL OF ECONOMICS, Vol. 28, No. 4, pp. 732-50 (Winter 1997) (Emmons & Prager Study) (Defendants' Exhibit 5 (admitted 10/14 Tr., at 27:17-19)).

   - "Determinants of the marginal cost of providing basic cable television service include population density (DENSITY), system AGE, and local wage rates. The cost of adding a subscriber to a cable system generally declines as population density increases." (Emmons & Prager Study, at 738.)
   - "The population-density variable had a negative, statistically significant impact on price in both years, consistent with our expectations." (Emmons & Prager Study, at 739.)
   - In Table 3 (1983 Reduced-Form SUR Estimates) under the heading "ln(BASICPRICE)" the variable for the logarithm of population density shows a parameter estimate of .089 and t-statistic of -3.54 meaning that the relationship between population density and price is negative and statistically significant at the .01 level. (Emmons & Prager Study, at 740.)
   - In Table 4 (1989 Reduced-Form SUR Estimates) under the heading "ln(BASICPRICE)" the variable for the logarithm of population

density shows a parameter estimate of -.085 and *t*-statistic of -4.20 meaning that the relationship between population density and price is negative and statistically significant at the .01 level. (Emmons & Prager Study, at 740.)

8. Scott J. Savage and Michael Wirth, *Price, Programming, and Potential Competition in U.S. Cable Markets*, JOURNAL OF REGULATORY ECONOMICS, vol. 27, pp. 25-46 (2005) (Savage & Worth Study) (Defendants' Exhibit 4 (admitted 10/14 Tr., at 25:17-19)).

   - "Costs should be higher in high wage markets, but lower in densely populated markets so $\delta_5 > 0$ [the coefficient on hourly wage of cable system technical employees in the supply structural model] and $\delta_6 < 0$ [the coefficient on population density in the supply structural model] are expected. Further, a finding of $\delta_6 > 0$ [the coefficient on population density squared in the supply structural model] for DEN2 indicates that the cost advantages dampen in markets with very high population density." (Savage & Wirth Study, at 34-5.)

   - In Table 2 (Cable Operator Supply-Demand Estimates) under the heading "Supply Relation Price" the variables for population density and population density squared in the structural supply model show parameter estimates of -2.4690 and 0.2394 respectively, with standard errors of 1.2368 and 0.2006 respectively. The results for population density show that the relationship between population density and price is negative and statis-

tically significant at the .05 level. The results for the population density squared show that the relationship between density squared and price is not statistically significant. (Savage & Wirth Study, at 38.)

PX 79

Overview of Results

- $876 Million Damage Estimate
- Common Impact:
  - All Years
  - All Geographic Areas
  - All or Virtually All Customers
- Statistical Results: Reliable and Robust
- Results Consistent with Other Findings

PX 81

Dr. McClave's Benchmark Consists of Only "Smaller, Rural" Counties?

Large, Urban Counties in the McClave Benchmark:

Los Angeles, CA

Orange, CA

Sacramento, CA

Dallas, TX

Marion, IN (Indianapolis)

Fulton, GA (Atlanta)

Gwinnett, GA (Atlanta Area)

Salt Lake City, UT

86% of Comcast subscribers in the benchmark reside in counties that are more urban than rural.

Source: Comcast AmDocs and CSG billing systems; U.S. Census

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLINE BEHREND, et al.	:	CIVIL ACTION NO.
	:	
	:	
v.	:	
COMCAST CORPORATION, et al.	:	03-6604
	:	
	:	

MEMORANDUM

Padova, J. **April 12, 2012**

I. INTRODUCTION

Presently before the Court in this class action suit alleging violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, is the motion of Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") for summary judgment pursuant to Fed. R. Civ. P. 56. The Third Amended Complaint alleges that Comcast entered into agreements with its competitors to allocate the nation's regional cable markets amongst themselves through swaps of their respective cable assets. The Class alleges that, as a result of all the swap agreements, Comcast unreasonably restrained trade and willfully obtained and maintained monopoly power in the relevant geographic market, the Philadelphia direct marketing area ("DMA"). The Class contends that Comcast has

used its monopoly power to raise cable prices to artificially high, supra-competitive levels. For the following reasons, we grant Comcast's motion for summary judgment on the Class's section 1 claim, insofar as it charges that Comcast's conduct was a *per se* violation of the antitrust laws. We also grant the motion in part on the Class's section 2 claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party also bears the burden of proof at trial, that party must support its motion with sufficient evidence that would entitle it to a directed verdict. In re Bressman, 327 F.3d 229, 237 (3d Cir. 2003) (citations omitted). Once the moving party has made such a showing, the non-moving party can defeat the motion "with probative evidence that would demonstrate the existence of a triable issue of fact." Id. at 238 (citations omitted).

III. SECTION 1 *PER SE* LIABILITY BASED UPON HORIZONTAL MARKET ALLOCATION

In order to prove its antitrust claims, the Class must establish: (1) a violation of the antitrust laws, here sections 1 and 2 of the Sherman Act, (2) individual injury resulting from that violation (antitrust impact), and (3) measurable damages. 15 U.S.C. § 15; In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) (citing Am. Bearing Co. v. Litton Indus., Inc., 729 F.2d 943, 948 (3d Cir. 1984)). Section 1 of the Sherman Act condemns contracts, conspiracies, and combinations in restraint of trade. 15 U.S.C. § 1. Because even beneficial legitimate contracts or combinations restrain trade to some degree, section 1 has long been interpreted to prohibit only those contracts or combinations that are "unreasonably restrictive of competitive conditions." Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911). "Three general standards have emerged for determining whether a business combination unreasonably restrains trade under section 1." United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993).

Under traditional "rule of reason" analysis, a fact finder "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977). "The inquiry is whether the restraint at issue 'is one that promotes competition or one that suppresses competition.'" Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978)). To estab-

lish a section 1 violation under the rule of reason test, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. Rossi v. Standard Roofing, Inc., 156 F.3d 452, 464-65 (3d Cir. 1998) (citation omitted).

> "The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets." Brown [Univ.], 5 F.3d at 668. "The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects," or defendant's market power. Id. "If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anticompetitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." Id. at 669. "To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective." Id.

Deutscher Tennis Bund, 610 F.3d at 830.

Certain restraints are *per* se illegal "'because of their pernicious effect on competition and lack of any redeeming virtue. . . .'" Id. (quoting Brown Univ., 5 F.3d at 669); see also N.W. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co., 472 U.S. 284, 289-90 (1985). However, "'[p]er se liability is reserved for only those agreements that are so plain-

ly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" Deutscher Tennis Bund, 610 F.3d at 830 (quoting Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (stating "this Court presumptively applies rule of reason analysis. . . .") (quoting Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 692)); see also State Oil v. Khan, 522 U.S. 3, 10 (1997) ("Per se treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" (quoting Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982) (alteration in original)). A horizontal market allocation agreement is one of the species of perniciously anticompetitive conduct that is *per se* illegal. See Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990) (per curium); United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).

Finally, courts apply an intermediate or "quick look" rule of reason analysis "in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint." Deutscher Tennis Bund, 610 F.3d at 830 (quoting Brown Univ., 5 F.3d at 669 (internal quotation marks omitted)). "Under 'quick look' analysis, the competitive harm is presumed, and 'the defendant must promulgate 'some competitive justification' for the restraint.'" Id. at 831 (quoting Brown Univ., 5 F.3d at 669 quoting NCAA v. Bd. of Regents, 468 U.S. 85, 110 (1984)).[1]

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[1] The selection of the mode of analysis to apply to an antitrust claim is a question of law for the court to determine. California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1124 (9th

[Footnote continued on next page]

Comcast argues that application of the *per se* rule here is improper for several reasons. First, it asserts that courts are increasingly reluctant to apply the *per se* label, especially where the economic impact of the challenged business practice is not immediately obvious. Second, no court has previously condemned as a *per se* violation transactions that have been approved by federal antitrust or regulatory agencies.[2] Third, it asserts that the alleged mar-

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[Footnote continued from previous page]

Cir. 2011) (holding that the selection of the proper mode of antitrust analysis is a question of law, to be reviewed *de novo* on appeal (citing XI Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1909b, at 279 (2d ed. 2005))); Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004) (stating that whether a plaintiff's alleged facts comprise a *per se* claim is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment); Deutscher Tennis Bund, 610 F.3d at 833 (holding that the "application of the quick look analysis is a question of law to be determined by the court," and therefore has no application to jury inquiry (citing ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases A–8 n. 2 (2005))).

[2] Comcast's argument about *per se* liability and regulatory approval is not new. In deciding Comcast's Rule 12(b)(6) motion, we rejected – both on initial review and on reconsideration – its argument that the initial Class Complaint failed to state a *per se* violation, finding that the allegations supported a claim that the swap agreements constituted a horizontal market allocation. Addressing one of Comcast's main arguments, we held that "[t]he mere fact that regulatory and law enforcement agencies may have reviewed and approved the challenged transactions is not ground for dismissal of Plaintiffs' claims." Glaberson v. Comcast Corp., Civ. A. No. 03-6604, 2006 WL 2559479, at *10 (E.D.Pa. Aug. 31, 2006) *modified* by Glaberson v. Comcast Corp., Civ. A. No. 03-6604, 2006 WL 3762028

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ket allocation here was not among competing firms.[3] Finally, Comcast contends that the swap transactions were not naked restraints on trade because no markets were actually allocated since the swap agreements did not contain no-compet lauses restricting the Counterparties from re-entering the market and competing with one another. The Class responds that the summary judgment record establishes a horizontal allocation of markets between competitors that is a naked restraint on trade constituting a *per se* violation of section 1.

A. Comcast's Acquisition of Cable Companies and Cable Assets

Beginning in 1998, Comcast embarked upon a course of conduct to create a cable "cluster" in the Philadelphia DMA by acquiring the cable systems of other large multi-system operators ("MSOs") that op-

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(E.D.Pa. Dec. 19, 2006) (citing Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973) (explaining that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless maybe subject to scrutiny under the antitrust laws"); Cableamerica Corp. v. Fed. Trade Comm'n, 795 F. Supp. 1082, 1092 (N.D. Ala.1992) (stating that "'[a]ntitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct'" and that "'[t]here is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry'" (quoting Phonetele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 729 (9th Cir. 1981)))).

[3] Comcast argues that because the transactions were not among competitors, the entire section 1 claim fails, even if analyzed under the rule of reason. We will return to this issue *infra*.

erated and offered multichannel video programming distributor ("MVPD") service in various franchise areas in the Philadelphia DMA. (See Class Certification Memorandum Opinion, Doc. No. 430, entered January 7, 2010 ("Class Cert. Mem."), at 7-8 n. 8; Def. Ex. 59, Deposition of Michael A. Williams, Ph. D. on May 29, 2009 ("Williams Dep."), at 104-105.) In the first acquisition transaction, occurring in April 1998, Comcast acquired from Marcus Cable certain cable systems operating as the incumbent wireline MVPD provider in franchise areas located in Kent County, Delaware, serving approximately 27,000 subscribers. (See Compl., ¶ 52(a)[4]; Class Cert. Mem., p. 7-8 n.8.) In June 1999, Comcast acquired from Greater Philadelphia Cablevision, Inc. certain cable systems operating as the incumbent wireline MVPD provider in franchise areas located in one of the four franchise areas in the City of Philadelphia. The system had approximately 79,000 subscribers. (Compl. ¶ 52(b); Class Cert. Mem., p. 7-8 n.8.)

In January 2000, Comcast acquired certain cable systems previously owned and operated by Lenfest Communications, Inc. ("Lenfest") in the Philadelphia region. The Lenfest systems operated as the incumbent wireline MVPD operator in franchise areas located in Berks, Bucks, Chester, Delaware, and Montgomery Counties, Pennsylvania; Atlantic, Camden, Burlington, Cape May, Cumberland, and Salem Counties, New Jersey; and New Castle County, Delaware. These cable systems served approximately 1.1 million cable subscribers. (See Compl., ¶ 52(c);

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[4] All references herein to the Complaint are to the Class's Third Amended Complaint.

Class Cert. Mem., p. 7-8, n.8.) Comcast also acquired Lenfest's ownership interests in Garden State Cablevision L.P. and its 212,000 subscribers located in the Philadelphia DMA. (Expert Decl. of Michael Williams, Ph.D. ¶ 113 ("Williams Decl.").) Thus, Comcast acquired a total of approximately 1.25 million subscribers from Lenfest.

Comcast's acquisition of the Lenfest systems was part of a larger course of conduct of swapping cable assets to build Comcast's cable cluster in the Philadelphia DMA. In December 2000 and April 2001, Comcast and AT&T Corporation swapped certain cable system assets that were previously owned by MediaOne Group, Inc., including AT&T-owned systems operating as the incumbent wireline MVPD provider in franchise areas located in the Philadelphia region. (See Compl., ¶ 55(a), (c); Class Cert. Mem., p. 7-8, n. 8.) Prior to the transaction, Comcast had sought a merger agreement with MediaOne, but AT&T had made a superior bid. (Pl. Ex. 32 at COMPA1151021.) Rather than engage in "another round of competitive bidding," Comcast and AT&T "reach[ed] an amicable and acceptable alternative" calling for Comcast to terminate its proposed merger and for the two companies to divide the MediaOne assets between themselves. (Id.) In the transaction, Comcast acquired from AT&T approximately 1.365 million MediaOne and legacy AT&T subscribers in the Philadelphia DMA – representing all of AT&T's cable assets and subscribers in the Philadelphia DMA – in exchange for AT&T's receipt of all of Comcast's cable assets and subscribers in Chicago and certain parts of California, Colorado, Florida, Georgia and Pennsylvania (all of which were outside the Philadelphia DMA). (Williams' Decl. ¶ 113; Compl.

¶ 55(b).) As a result of the transaction, AT&T exited the Philadelphia DMA.

Leo Hindery, the former CEO of TCI, as well as AT&T Broadband after it acquired TCI, authored a book in which he described how Comcast's acquisition of Lenfest was intimately tied to the AT&T/Comcast/MediaOne swap transaction. At that time, AT&T owned 50% of Lenfest, with the other 50% owned by the company's founder, Harold "Gerry" Lenfest, and his family. Hindery, who wanted to acquire MediaOne to both build AT&T's cable business and to create cross-marketing opportunities for AT&T's branded telephone service, developed a strategy to combat Comcast's bid for MediaOne by attempting to purchase the other half of Lenfest in order to offer it as "trade bait" to Comcast in exchange for Comcast dropping its pursuit of MediaOne. (Pl. Ex. 52, Hindery, The Biggest Game of All, p. 133, 146-151.) Hindery was successful, and the combined result of the transactions gave Comcast control of its own legacy franchises in the Philadelphia DMA, the much larger holdings of Lenfest, and AT&T's former legacy franchises in the Philadelphia DMA.

In January 2001, Comcast and Adelphia Communications Corporation swapped certain cable system assets, including Adelphia-owned systems operating as the incumbent wireline MVPD provider in franchise areas located in Chester, Delaware and Montgomery Counties, Pennsylvania, involving 464,000 subscribers – representing all of Adelphia's cable assets and subscribers in the Philadelphia DMA. As a result of the transaction, Adelphia exited the Philadelphia DMA. (See Compl., ¶ 55(b); Class Cert. Mem., p. 7-8, n. 8; Williams Decl. ¶ 113.)

In July 2006, Time Warner Cable, Inc. ("Time Warner") and Comcast acquired, pursuant to a joint bid, certain cable systems from the bankruptcy estate of Adelphia (the "Time Warner/Comcast/Adelphia Transaction"). As part of the Time Warner/Comcast/Adelphia Transaction, Comcast and Time Warner swapped certain cable systems, including both self-owned systems as well as Adelphia-owned systems. One of the systems Comcast acquired was a Time Warner-owned cable system operating as the incumbent wireline MVPD provider in the city of Philadelphia, serving approximately 40,000 subscribers. (See Adelphia Comm'ns Corp., 21 FCC Rcd 8203 (2006) ("Time Warner/Comcast/Adelphia Order"), ¶ 12; see also Class Cert. Mem., p. 7-8, n. 8.) The transaction involved all of Time Warner's cable assets and subscribers in the Philadelphia DMA. As a result of the transaction, Time Warner exited the Philadelphia DMA.

Finally, in August of 2007, Comcast acquired from Patriot Media & Communications ("Patriot") certain cable systems operating as the incumbent wireline MVPD provider in franchise areas located in Somerset, Hunterdon, Morris and Mercer counties in New Jersey, serving approximately 81,000 subscribers. (See Class Cert. Mem., p. 7-8, n. 8; Def. Ex. 38, Plaintiffs' Class Certification Hearing Ex. 91; see also Def. Ex. 27, Comcast Press Release, Comcast Corporation to Acquire Patriot Media, April 3, 2007.)

B. The Class's Evidence of Comcast's Anticompetitive Intent in Forming the Philadelphia Cluster.

The Class presents evidence in several areas to support its contention that there are genuine issues of material fact concerning whether Comcast had an-

ticompetitive intent in entering into the swap transactions.

1. Evidence that Comcast had a long-standing corporate strategy to develop clusters.

The Class cites to internal Comcast documents evincing a twenty-year strategy of acquiring cable properties in contiguous areas, including the Philadelphia DMA. (See e.g., Pl. Ex. 49, "Comcast History - 1998-1999," p. 3 ("For nearly twenty years, Comcast had pursued a strategy of acquiring cable properties in contiguous areas, especially in the Atlantic seaboard region. . . ."); Pl. Ex. 51, Special Board Mtg. Minutes of May 24, 1999, p. 1 (concerning the Adelphia swaps, Comcast CEO Brian Roberts "noted that the Company, under the proposed swaps, would acquire cable systems in New Jersey and Eastern Pennsylvania to enhance the Company's clustering strategy in its mid-Atlantic region.").) In announcing the bid to acquire MediaOne assets, CEO Roberts emphasized that the combination would have a direct clustering effect, giving Comcast clusters in the top 20 markets representing 80% of the cable market and would leave Comcast a "well-clustered company." (Pl. Ex. 54, Tr. of Conf. Call of March 22, 1999, p. 2.) After the agreement with AT&T supplanted Comcast's initial MediaOne bid, and resulted in Comcast and AT&T allocating Lenfest's cable systems to Comcast, Roberts stated that Comcast's "clustering position becomes even better." (Pl. Ex. 49, Comcast History 1998-1999, p.12.) Comcast COO Steven Burke testified that Comcast's goal was "to have clusters that were as big as possible in each DMA, our goal was and is." (Pl. Ex. 82, Dep. of Steven Burke on December 5, 2008 ("S. Burke Dep."),

117:10-12.) Burke wrote to the attendees of a corporate retreat that, "[f]ully 85% of our 8.2 million subscribers will be in clusters over 200,000 subscribers. These clusters represent a unique opportunity to maximize our business if we learn how to manage them as efficiently as possible." (Pl. Ex. 63, "Clusters/2000 Management Retreat," p.1 (emphasis in original).) Robert Pick, Comcast's executive in charge of corporate development wrote that clustering "is the impetus for the next wave of cable acquisitions." (Pl. Ex. 26A, "Trades/Swap Memo.") In testimony before the FTC in the Adelphia acquisition case, Pick stated that Comcast and Time Warner agreed to divide Adelphia assets between themselves to enable geographic clustering, which "was really most important to Comcast. . . . [T]o the extent we could get an entire market, that was important because we wanted – we wanted clustering." (Pl. Ex. 26, Dep. of Robert Pick of July 19, 2005, 36:5-21.)

2. Evidence that the purpose behind the swaps and acquisitions strategy was to control, dominate and consolidate cable markets.

The Class cites numerous Comcast internal documents as evidencing its strategy to gain control over cable markets. In announcing Comcast's acquisition of Lenfest, Roberts stated that "Comcast views geographic consolidation of key markets as critically important to the company's future." (Pl. Ex. 62, Comcast Press Release of January 18, 2000, p.1.) Joseph Donnelly of Comcast's corporate development unit wrote about the Adelphia acquisition, "step back and say where does it get us – ie – can we dominate mkt, etc." (Pl. Ex. 29, Handwritten note on Letter of July 22, 1999.) An analysis of a Toledo, Ohio cable com-

pany noted its acquisition "would present Comcast with the opportunity to own approximately 50% of the 66 largest DMA in the nation." (Pl. Ex. 39, Memo of May 27, 1999.) An analysis of Cablevision properties stated that the "Cleveland market offers Comcast the opportunity to consolidate the 13 largest DMA in the country, as currently, no MSO dominates this market" and the "Kalamazoo system offers Comcast the opportunity to dominate a top-50 DMA, provided Comcast does a second swap with AT&T to obtain its subscriber base in this market." (Pl. Ex. 40, Memo of October 13, 1999, p. 4.) A 2005 memo about New Hampshire stated Comcast had a "real opportunity to consolidate this market along DMA-rational lines and effectively lock up one of the real growth areas in New England." (Pl. Ex. 41, Email of October 19, 2005.)

3. Evidence that clustering was a common strategy among market participants.

In his book, Leo Hindery declared that shared markets made no sense in the cable industry; that the industry would benefit from clustering with one cable operator per market; and to effectuate this happening, cable operators would have to voluntarily swap systems across the country. (Pl. Ex. 52, Hindery, The Biggest Game of All, p. 73-74.[5]) In his dep-

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[5] Hindery wrote that cable systems owning spread out franchises,

> had always struck me as nonsensical. It was inefficient for cable operators and confusing for customers. I strongly believed that the entire industry, including TCI, would benefit enormously by "clustering" cable systems into specific markets, with one cable operator per market. To make

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osition, Hindery testified that "the whole premise . . . was that some operators would leave an area and others would stay and you would become the significant operator in that DMA." (Pl. Ex. 89, Dep. of Leo Hindery of November 14, 2008 ("Hindery Dep."), 190:14-16.) He stated that "all of the cable operators by 1997, 1998, at TCI's urging, adopted [his strategy]. . . . Every major company participated in the exchange of systems over those 24 months, roughly." (Id. at 86:14-18.)

When asked about Comcast's desire to control DMAs, Brian Roberts stated in his deposition that, during the time frame of the July 2006 Time Warner/Comcast/Adelphia swap transaction, "there was a lot of swapping going on, as you referred to, that Mr. Hindery facilitated. Satellite is there, as a real competitor. There are other competitors in the market, real and future competitors, like phone companies. I think it's, you know, the notion of aggregating more customers in one cluster. Once you do so, there's only an incumbent cable company in each of these different 30,000 franchises, and if somebody is able to secure acquiring them, then they have a major presence in the market." (Pl. Ex. 93, Roberts Dep., 127:22-128:11.)

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> this plan work, however, we'd have to convince other cable operators to voluntarily swap systems across the country. This was no small challenge. To pull it off, we'd have to get everybody to agree to basic valuations and stick to them. But I knew it was quite doable, provided we could get everybody rowing in the same direction.

(Pl. Ex.52 at 73-74.)

4. Evidence that the swap agreements were naked restraints of trade as market and customer allocations.

To support its position that Comcast engaged in an illegal market allocation scheme, the Class cites to numerous Comcast internal documents, wherein company executives discussed "rationalizing" the cable industry through possible cable swaps and acquisitions that would consolidate Comcast's position in certain markets in exchange for its giving up positions in other markets. (See Pl. Ex. 28, Memo of August 15, 1996, p. 2 ("Both Comcast and Adelphia would like to obtain the other's eastern Florida systems."); Pl. Ex. 32, Special Bd. Mtg. Minutes of May 4, 1999, p. 3 (listing systems to be swapped between Comcast and AT&T); Pl. Ex. 36, Memo of July 11, 1996 (discussing Philadelphia DMA as a "Comcast Sacrosanct System"; and proposing swaps in California); Pl. Ex. 37, Memo of September 29, 1997 (discussing swap of Pittsburgh system for New Jersey and Tennessee systems to "further rationalize the NYC"); Pl. Ex. 38, Memo of May 25, 1999 (discussing clustering opportunity in Southeast Georgia and South Carolina, including swaps of Savannah and Macon, Georgia systems where Comcast "currently dominates each of these markets"); Pl. Ex. 42, Memo of April 6, 2000 (discussing swap of Muncie, Indiana for Kentucy systems to enable Comcast to "get even better clustered" in the Indianapolis DMA in exchange for "get[ting] out of Kentucky"); Pl. Ex. 44 at COM-PA2107968, (attachment to email of April 8, 2003 discussing swaps in Ohio, Kentucy, Indiana, and New Mexico "to rationalize the large Ohio markets"); Pl. Ex. 46, Email of November 13, 2003 (discussing swaps in Tennessee, Colorado and New Mexico that were never consummated)). The Class also

cites Steve Burke's testimony that Comcast and AT&T agreed to swap their respective cable assets in Philadelphia and Chicago because "there was no clear path to [Comcast] having a big cluster in Chicago, it would make more sense for us to get Philadelphia and to swap Chicago." (Pl. Ex. 82, S. Burke Dep. 109-110.) Robert Pick described the swapping of cable assets between Comcast and Time Warner as "horse trading" among the companies. (Pl. Ex. 26, Pick FTC Testimony, at 23:25-25:6; Pl. Ex. 92, Pick Dep. 228:3-8.)

5. Evidence that Comcast had anticompetitive intent to allocate markets.

The Class asserts that Comcast had an anticompetitive intent to allocate the Philadelphia DMA in entering into the AT&T transaction, based primarily upon the content of Leo Hindery's book describing the negotiations between Comcast and AT&T.[6] The

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[6] In his book, Hindery wrote,

> Comcast, which is based in Philadelphia, had been trying for years to buy Lenfest Communications, which owned the cable systems in suburban Philadelphia. Gerry Lenfest, the company's founder and namesake, had always refused to sell. Luckily for me, AT&T owned 50 percent of Lenfest. To entice Brian [Roberts] to stand down on MediaOne, I decided to offer him Lenfest Communications. . . .
>
> I told Brian flat out that he could have Lenfest, and therefore the Philadelphia systems he'd wanted for so long, on one condition. He had to promise right then and there not to fight me on MediaOne. He had to agree to take Lenfest as a consolation prize and walk away. . . . Brian considered my offer, then extended his had to shake on the deal.

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Class describes the deal as an agreement by Comcast to stand down from competitive bidding with AT&T for MediaOne in return for receiving Lenfest. (Class Pl. Mem. at 43.) Its evidence of anticompetitive intent includes the Comcast Board minutes describing "discussions with AT&T to reach an amicable and acceptable alternative to another round of competitive bids," (Pl. Ex. 32, Special Mtg. Of Bd. Minutes of May 4, 1999, p. 2), as well as deposition evidence that the transaction made Comcast the dominant cable operator in the Philadelphia DMA. (See Pl. Ex. 31, Donnelly "Lenfest Due Diligence" Memo at 4 ("The acquisition of Lenfest will make Comcast the dominant CATV operator in the Philadelphia DMA (rank – 4th)"); Pl. Ex. 89, Hindery Dep., 53:16-20 ("Q. When it attained Lenfest, did Comcast become dominant within the Philadelphia DMA? . . . A. It certainly became the largest cable operator in that market, yes.); Pl. Ex. 102, AT&T Bd. of Directors Mtg. of March 17, 1999 "Executive Summary" (noting Lenfest "is the leading cable television operator in the greater Philadelphia market.").[7]

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(Pl. Ex. 52, Hindery, The Biggest Game of All, p. 2.)

[7] In response to this evidence, Comcast asserts that the Class's reliance upon the Lenfest transaction to support a *per se* claim of market allocation is improper because the Lenfest transaction was an acquisition transaction, not a swap of cable assets. Comcast argues that the Class seeks to mischaracterize the Lenfest sale as a swap because we have previously held that the *per se* claim is limited to the Class's allegations in the Third Amended Complaint that only the swap agreements constituted *per se* violations, while the Class separately alleged that the acquisition agreements were subject to rule of reason analysis. See Glaberson, 2006 WL 2559479, at *9 n.7 (citing Third

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6. Evidence of non-compete provisions.

The Class argues that the existence of non-compete clauses further supports application of the *per se* rule. Contrary to Comcast's factual assertion, the Class asserts that following the MediaOne deal, Comcast obtained non-compete agreements with Gerry Lenfest and members of his family. (Pl. Ex. 25, Non-Compete Agreement of January 18, 2000.) The term was 3 years and covered Pennsylvania, Delaware and New Jersey. (Id.) While it does not assert that the non-compete agreements were themselves a *per se* violation,[8] the Class asserts that the non-compete agreements are evidence that Lenfest exited the market, and of Comcast's intention to dominate the Philadelphia market.

7. Evidence of the consequences of the swaps.

Finally, the Class contends that there is ample evidence of anticompetitive consequences arising from Comcast's clustering activity. It offers Dr. Williams' opinions that Comcast's gain in market share was a consequence of the swap transactions, making

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Amended Complaint ¶¶ 73-74.) Based on the Hindery evidence, we find that the Class has met its summary judgment burden to demonstrate a genuine issue of fact whether AT&T's agreement to sell the Lenfest assets was an integral part of a broader agreement to swap cable assets between AT&T and Comcast.

[8] We have previously held that non-compete agreements executed upon the sale of a business are generally not recognized as antitrust violations, see Class Cert. Mem. at 18-19, and rejected the Class Expert's market structure analysis to the extent he relied upon the Lenfest non-compete agreement. (Id.)

the Philadelphia DMA more concentrated, creating entry barriers, removing firms that competed in the geographic market, deterring overbuilding, and increasing prices. (Williams Decl. ¶ 56 ("In sum, economic analysis shows that Comcast's alleged anti-competitive conduct in the Philadelphia DMA reduced the extent of competition provided by overbuilders in the Philadelphia DMA. Econometric evidence shows that reductions in overbuilding cause cable rates to increase, all else equal. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA."); ¶ 120 ("the effect of the swaps is to allocate that geographic market between the firms;" "market allocation has diminished competition in the Philadelphia DMA".)

C. Comcast's Evidence of Pro-Competitive Justifications.

Comcast responds to the Class's evidence by contending that none of the swap transactions were "naked" market allocation agreements with no other purpose or effect; that each involved real, substantial exchanges of plant, infrastructure, employees, contracts and other business resources; and its growth strategy to use clustering did not transform otherwise lawful swap agreements into a horizontal market allocation because cable firms have legitimate business reasons for clustering that have been recognized by regulators and the Class's own experts. Comcast asserts that the summary judgment record establishes that clustering the Philadelphia DMA allowed it to introduce new products, such as high-speed internet, telephone, pay per view, video on demand, digital video recorders, digital cable, sub-

stantially increased channel choice and high-definition television. (Def. Statement of Undisputed Facts ¶ 48; Def. Ex. 50, Doyle Dep., 91:12-92:3. [9]). It also asserts that the economies of scale associated with clustering enable cable providers to compete against DBS companies with a national footprint, as well as telephone companies, who by virtue of their existing telephone clusters, and possessing vastly larger resources, were emerging as competitors in multiple product markets – video, data and telephone. (Def. Statement of Undisputed Facts ¶ 49-51; Def. Ex. 54, Deposition of Robert S. Pick on October 28, 2008 ("Pick Dep."), 56:1-57:23 [10]; see also Def. Ex.

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[9] Michael Doyle, the president of Comcast's Eastern Division, testified that

> one additional advantage of the clustering, too, is your ability of getting into the new products. In a lot of Comcast acquisitions where companies were smaller, they didn't have and didn't spend the capital necessary to offer the new products. And so certainly the advantage to clustering is you have the resources and you have the personnel who can run the new products. And in this day and age, as well as it's been over the last years, it's not a video industry anymore. It's a video, Internet, and telephone industry. It's a commercial business application.
>
> So, I think the clustering certainly gives you the ability to offer more advanced services to consumers.

(Def. Ex. 50, Doyle Dep., 91:12-92:3.)

[10] Robert Pick, Comcast's senior vice president of corporate development, testified that

> the idea of clustering just sort of morphed from the industry. Part of it was competitively driven when you have – when you had like the direct broadcast satellite providers come into being. Their footprint by nature is national.

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51, Hindery Dep., 132:11-15 [11]; Def. Ex. 56, Roberts Dep., 144:23-145:22.[12]). Finally, it asserts that the

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> They just put a satellite up in the air and then the signal can reach most of the country.
>
> So when their footprint is national, you know, and we're dealing with small franchises, we obviously cannot compete effectively. They can tell one story. They have an upgraded network. They give one channel lineup. They can offer more channels. So for us to compete when we're just a particular franchise in a market makes it more difficult. It also started to develop as the telephone companies got into the business and their – their footprint by nature is much larger than ours. And so – and then it just sort of happened when you – you know, TCI at one point in time was the largest cable operator in the U.S. and they were financially and operationally stressed at one point in time, so they looked to create clusters or they were giving – they've either sold systems or created joint ventures with – with operators where they would put the systems, clustered systems, on a local basis and said to an operator, here, you run it, you're better able to run these things because of the scale economies within a cluster.

(Def. Ex. 54, Pick Dep., 56:6-57:13.)

[11] Hindery testified that clustering "had nothing to do with controlling the market. It had everything to do with putting ourselves in an operating cost structure that mirrored as closely as possible our nearest and closest competitors." (Def. Ex. 51, Hindery Dep., 132:11-15.)

[12] Roberts testified that

> [t]here was, post-'92, as I have said repeatedly, a desire to take this patchwork of cable systems, and create more sensible businesses so we can compete more effectively in the future against the oncoming competitors, who all had complete DMAs, where in case of satellite, two competitors for every market who had a hundred percent market share in the United States. So every home in America can get the

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FCC has recognized the efficiencies associated with clustering and expressly considered the potential effects of clustering when it approved the Time Warner/Comcast/Adelphia transaction in 2006, well after clustering in the Philadelphia DMA had already occurred. (Def. Statement of Undisputed Facts ¶ 52-53; Def. Ex. 17, FCC 99-418, Sixth Annual Competition Report, ¶¶ 161-162[13]; see also Def. Ex. 18, FCC 01-1, Seventh Annual Competition Report, ¶ 166 (clustering "permits cable operators to . . . gain efficiencies related to economies of scale and scope resulting in lower administrative costs, enhanced de-

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> product. They [national footprint DBS providers] can run an ad in the middle of the Super Bowl, let alone, in local broadcast television.
>
> So there was, no question, a lot of desire to try to get larger in markets.

(Def. Ex. 56, Roberts Dep., 144:23-145:22.)

13 FCC stated that

> Clustering of cable systems can create greater economies of scale and size. Accordingly, it can enable cable operators to offer a wider variety of broadband services at lower prices to customers in geographic areas that are larger than single cable franchise areas. Clustering can thus make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area. The General Accounting Office, in its report on the changing status of competition to cable television, also found that ownership ties and clustering strategies may provide cost savings and possible competitive advantages.

(Def. Ex. 17, FCC 99-418, Sixth Annual Competition Report, ¶ 162.)

ployment of new technologies and services, and encouraging the extension into previously unserved areas"); Def. Ex. 19, FCC 01-389, Eighth Annual Competition Report, ¶ 14 ("By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony.").).

Based in large part upon these governmental reports, Comcast's expert Dr. David Tecce opined that the entry of the DBS companies, who were capable of offering higher quality digital television in a nationwide footprint, created a competitive crisis for cable firms, who up to that time were providing analog signals to non-contiguous individual franchise areas.

> The need to make significant investments in order to upgrade cable systems to compete with DBS providers led to consolidation among cable operators. DBS had large-scale national operations, which gave them ability to take advantage of scale economies. To compete effectively, most cable firms needed to achieve larger scale.

(April 10, 2009 Expert Report of David J. Teece, Ph.D. ("Teece Report") at ¶ 17.) "As a result, cable firms sought to achieve economies of scale through mergers and acquisitions. Many old-line cable firms decided to sell their systems rather than make the investments in system upgrades necessary to stay competitive with DBS providers in the new competitive environment." (Id. ¶ 18.) Teece recounts the history of the "deployment of digital cable transmission that paved the way for cable firms to offer other advanced services. In addition to offering superior video picture quality, digital transmission allows for the provision of several other advanced digital services

such as HDTV, Video-on-Demand ("VOD"), Digital Video Recorder ("DVR"), broadband Internet, and cable telephony. These technological advances have ushered a new paradigm in the telecommunications industry, dubbed 'convergence,' under which multiple forms of telecommunications content (audio, video, and data) are delivered to the consumer by a single firm." (Id. ¶ 16 (citations omitted).) He concludes that:

> Regional clustering created significant efficiencies, including achieving economies of scale in upgrading systems to digital and to offer advanced services such as broadband Internet and cable telephony. . . . Clustering allowed cable operators to achieve regional scale comparable to DBS providers and ILECs. For instance, a former TCI and AT&T executive testified that clustering "had everything to do with putting ourselves in an operating cost structure that mirrored as closely as possible our nearest and closest competitors."

(Id. ¶ 21.)

Comcast also presents evidence that the entry of incumbent local exchange carriers ("LECs" or "ILECs") such as Verizon's FiOS system, also created new competition for the cable industry. Dr. Teece reports that ILEC competition, which by 2008 had captured 18% market share, is expected to continue to provide significant competition to cable and DBS firms in the next few years. (Id. ¶ 25-26.) He states:

> The threat of competition from ILECs has been another factor contributing to cable operators' clustering strategy. Because the IL-

> ECs' phone footprints were much larger than a typical cable franchise area, clustering allowed cable firms to capture economies of scale and compete effectively in offering advanced services and selling advertising. According to testimony from a former TCI and AT&T executive, clustering was designed to "meet the challenge of these regional phone companies coming and providing video and providing Internet over their existing phone lines.

(Id. ¶ 28 (citations omitted).) Dr. Teece concludes that Comcast's clustering in response to new sources of competition has benefitted consumers. He asserts that consumers benefit from the programming diversity brought about by increased MVPD channel capacity (id. ¶ 32-33), and from the ability of a clustered system to provide advanced services such as HDTV, internet and cable telephony (id. ¶ 34-39).[14]

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[14] Michael Salinger, Director of the Federal Trade Commission's Bureau of Economics, testified before the Senate Judiciary Committee on the Time Warner/Comcast/Adelphia transaction that:

> It was also very clear from the outset that the parties' principal objective in making the acquisition and asset swap was to increase "clustering" in the TWC and Comcast cable assets. Clustering enables cable firms to realize economies of scale associated with providing cable service in contiguous areas. By acquiring contiguous systems, TWC and Comcast could lower several categories of costs, such as management, administrative and marketing costs, as well as the expense of providing system upgrades. In addition, TWC and Comcast could use clustering to position themselves better to compete with local telephone

[Footnote continued on next page]

Another Comcast expert, Dr. Stanley Besen, opines that entry into the MVPD market by ILECs, who are essentially in the same shoes as wireline overbuilders, has not been impeded by clustering. He opines that,

> Verizon is currently an actual competitor, providing service that is comparable to that provided by the other operators in large sections of the Philadelphia Cluster. Moreover, Verizon is a well-financed, sophisticated company, with access to the same programming that is available to Comcast, an established brand-name, and long-standing consumer relationships. In addition, it is able to offer both telephone and high-speed internet services along with television programming, in what has come to be called "Triple Play" packages. In short, it poses a formidable competitive threat to Comcast and other cable operators not only as a potential but as an actual competitor. Verizon was not eliminated as either an actual or potential competitor by the transactions at issue so that, on Plaintiffs' theory, households in the areas that they serve, or might serve in the future,

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[Footnote continued from previous page]

> companies and other providers in the delivery of video and telephone service.

(Def. Ex. 22, Michael Salinger, Dir. Bureau of Econ., Prepared Statement of the FTC: Sports Programming and Cable Distribution: The Comcast/Adelphia/Time Warner Transaction (Dec. 7, 2006), p. 4.)

have not been harmed by the transactions at issue.

(May 6, 2009 Expert Report of Dr. Stanley Besen ¶ 32 (citations omitted).)

D. Analysis

The United States Supreme Court has held that the *per se* test applies to naked restraints on trade, one where the "purpose of the practice are to threaten the proper operation of our predominantly free-market economy – that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" Broad. Music, Inc. v. CBS., 441 U.S. 1, 19-20 (1979) ("BMI") (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978); see also 2 Areeda and Hovenkamp, Antitrust Law, § 305 (3d ed. 2007) (*per se* rule "rests on various judgments about facts, economics, and social policy: that naked price fixing usually harms the economy if the collaborators have any marked power; that legitimate objectives are so rarely present that they should be disregarded; and that little or nothing worthwhile is lost by a categorical prohibition, which dispenses with unnecessary and costly litigation about power, purpose, effect, or claimed redeeming virtues, and which establishes the 'bright line' permitting those severe punishments that deter and guide private conduct."). The geographic division of markets among competitors is a *per se* violation of the Sherman Act. See Palmer, 498 U.S. at 49 (per curiam) ("[A]greements between competitors to allocate territories to minimize competition are illegal"); Topco Assocs., Inc., 405 U.S. at 608

("This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose other than stifling of competition.' Such limitations are *per se* violations of the Sherman Act." (alteration in original; internal citations omitted)).

However, even when the *per se* label has been applied to a category of anticompetitive conduct, the cases establish that courts may still look to see whether the economic effects of a particular practice in a particular industry justify abandoning a rule of reason analysis. In BMI, the Court found that, because the blanket license at issue, granting a licensee access to an entire music catalog, created an entirely different product from one that any given composer was able to sell by himself, and did not restrain the right of any individual copyright owner to sell his own compositions separately to any buyer at any price, it could not "be wholly equated with a simple horizontal arrangement among competitors." 441 U.S. at 23-24. The Court cautioned that when reviewing courts "have some doubt . . . about the extent to which [a] practice threatens the 'central nervous system of the economy,' . . . that is, competitive pricing as the free market's means of allocating resources," application of the *per se* rule should not be used to short circuit a more critical analysis of the practice. Id. (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940)). Similarly, in Eichorn, the United States Court of Appeals for the Third Circuit held that even where the plaintiff alleged a classic variety of *per se* violation, in that case a group boycott, where the facts used to establish the antitrust violation "are substantially different from the classic *per se* horizontal price fixing and group boycott conspiracies the Court has

generally found to be *per se* antitrust violations," the rule of reason must be used to determine whether the practice is condemned by section 1. Eichorn, 248 F.3d at 139 (citing BMI, 441 U.S. at 8 ("Easy labels [like price fixing] do not always supply ready answers.")).

The authorities agree that this "modern approach" to antitrust analysis should apply where the rationale of the *per se* rule does not neatly fit the industry involved. In BMI, the Supreme Court held that countervailing pro-competitive virtues, like the creation of efficiencies in the operation of a market or in the provision of goods and services, made application of the *per se* test inappropriate to blanket licenses for copyrighted music. 441 U.S. at 20 ("The blanket license, as we see it, is not a 'naked restrain[t] of trade with no purpose except stifling of competition,' White Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 702, 9 L.Ed.2d 738 (1963), but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use.")

In light of BMI, the earlier Topco decision, holding that horizontal market allocation agreements were a *per se* section 1 violation, has been criticized as going too far. One commentator stated,

> The Court in Topco was a bit like a driver who, because of his "rule" never to pick up hitchhikers, refuses to give a ride to a close friend whose car has broken down. This wooden approach to *per se* rules has been abandoned in subsequent horizontal restraint cases, particularly Broadcast Music, which emphasized the need to characterize restraints before applying a *per se* rule. . . .

> [U]nder Broadcast Music, a court must determine whether the restraint at issue is one to which the rationale of the rule applies. The Topco association could not possibly have been a cartel, because no licensee had a significant market share in its designated territory; the market shares were so trivial, that the licensees could have merged – at least under modern standards – without drawing the attention of the enforcement agencies. Moreover, the defendants articulated and proved procompetitive benefits. The association seems clearly to have been ancillary to a larger productive purpose.

2 Kintner, Federal Antitrust Law, § 11.39 (2002) (citing Eichorn; Polk Bros. v. Forest City Enter., 776 F.2d 185, 189-90 (7 Cir. 1985) (holding that *per se* rule is designed for "naked" restraints rather than agreements that facilitate productive activity)); see also Augusta News Co. v. Hudson News Co., 269 F.3d 41, 48 (1st Cir. 2001) ("Despite unguardedly broad language in [Topcol], it is commonly understood today that *per se* condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture."). In Polk Bros., the United States Court of Appeals for the Seventh Circuit noted that courts "must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote." Id. at 188 (citing National Collegiate Athletic Assoc. v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984)). Noting the Supreme Court's admonition in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984)

that "it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects," Polk Bros. stressed that

> a court must be very sure that a category of acts is anti-competitive before condemning that category *per se*. See [BMI] and NCAA, *supra*, both of which assess under the Rule of Reason horizontal agreements that also involve cooperation among rivals that might produce larger output and more desirable products. Both BMI and NCAA emphasize that condemnation *per se* is an unusual step, one that depends on confidence that a whole category of restraints is so likely to be anti-competitive that there is no point in searching for a potentially beneficial instance.

776 F.2d at 189; accord Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("Accordingly, 'we have expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'" quoting State Oil Co., 522 U.S. at 10); Eichorn, 248 F.3d 131, 144 n.2.

We find that the Class has failed to meet its summary judgment burden with respect to whether the swap transactions were naked market division agreements, rather than merely ancillary restraints on trade. The Class's evidence, for example, that Comcast executives, as well as Leo Hindery, had a long standing desire to "rationalize" the cable industry by consolidating positions in certain markets in exchange for giving up positions in other markets, does not support the conclusion that the swap agreements were naked restraints of trade that were "'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegali-

ty.'" Deutscher Tennis Bund, 610 F.3d at 830 (quoting Texaco Inc., 547 U.S. at 5). Moreover, the ability of cable companies to provide new and advanced services, achieved through clustering their systems, requires proof of facts that "are substantially different from the classic *per se* horizontal price fixing and group boycott conspiracies the Court has generally found to be *per se* antitrust violations.'" Eichorn, 248 F.3d at 139. The competitive efficiencies achieved by clustering – economies of scale needed to upgrade systems to digital service, and creating the ability to offer advanced services such as broadband Internet and cable telephony in larger geographic footprints to effectively compete with DBS providers and ILECs – are the type of pro-competitive conditions that the Third Circuit held can render an industry practice "substantially different from the classic" horizontal restraints subjected to *per se* treatment. Eichorn 248 F.3d at 139 (citing BMI, 441 U.S. at 8 ("Easy labels [like price fixing] do not always supply ready answers.")). Like the creation of the blanket license in BMI, creation of cable clusters in order to allow MVPD providers to offer new and improved products is not a categorically "naked restrain[t] of trade with no purpose except stifling of competition." BMI, 441 U.S. at 20. Accordingly, we hold that the rule of reason test is the proper method of analyzing the Class's section 1claim.

IV. SECTION 1 RULE OF REASON ANALYSIS – ACTUAL AND POTENTIAL COMPETITION

Having addressed the parties' arguments on the issue of *per se* liability, the only section 1 issue remaining to be decided is Comcast's argument that summary judgment must be entered in its favor be-

cause the transaction counterparties were never "competitors." In granting class certification, we determined that class treatment of the section 1 liability issue was limited to whether the Class could demonstrate that Comcast conspired **with competitors** to allocate markets. (See Amended Class Certification Order, Doc. No. 432, entered January 13, 2010 ("1/13 Order"), ¶ 11(a) (emphasis added).) Comcast argues that, even applying a rule of reason analysis to the section 1 claim, the Class has failed to meet its Rule 56 burden to create a genuine issue of fact that Comcast conspired with its competitors to allocate markets because the Transaction Counterparties never directly competed for cable subscribers. We find that the Class has met its Rule 56 burden to create a jury issue on whether Comcast and the Counterparties were competitors.

A. Evidence of Actual Competition.

Comcast concedes that, prior to the Transactions, Comcast and the Counterparties each offered cable services to subscribers in the Philadelphia DMA. However, it asserts that they were never "competitors" because, at all times, they operated cable systems in their own respective, non-overlapping franchise areas and never offered services to the same subscribers, at the same time, anywhere in the Philadelphia region. (Def. Ex. 59, Williams Dep., at 80:12-25, 104:24-105:3; Def. Ex. 46, Deposition of Steve Burke on December 5, 2008 ("S. Burke Dep."), at 15:23-16:6; 24:23-25:1, 51:17-22, 205:19-21; Def. Ex. 47, Deposition of Scott Burnside on November 11, 2008 ("Burnside Dep."), at 183:16-184:5; Def. Ex. 55, Deposition of Thomas Steel on July 17, 2008 ("RCN 30(b)(6) Dep."), at 192:21-193:17; Def. Ex. 51, Deposition of Leo Hindery, Jr., on November 14,

2008 ("Hindery Dep."), at 94:5-8; 167:9-12; Def. Ex. 52, Deposition of Harold (Gerry) Lenfest on November 18, 2008 ("Lenfest Dep.") at 89:14-90:5, 95:9-14; Def. Ex. 50, Deposition of Michael Doyle on November 6 and 20, 2008 ("Doyle Dep."), at 155:1-18; Def. Ex. 56, Deposition of Brian Roberts on September 23, 2008 ("Roberts Dep."), at 208:14-17.)

Prior to the Transactions, no class member had the option of simultaneously obtaining video programming from both Comcast and any of the Counterparties at the same household or within the same local franchise area. (See Def. Ex. 59, Williams Dep., at 104:24-105:3; Def. Ex. 51, Hindery Dep., at 167:9-12; Def. Ex. 46, S. Burke Dep., at 15:23-16:6; 24:23-25:1, 51:17-22, 205:19-21; Def. Ex. 50, Doyle Dep., at 155:1-18; Def. Ex. 56, Roberts Dep., at 208:14-17.) Because each cable company offered MVPD service within separate, non-overlapping franchise areas, Comcast asserts that it did not actually and directly compete with any Counterparty for the business of any cable subscriber. (See Def. Ex. 51, Hindery Dep., at 94:5-8, 167:9-12; Def. Ex. 52, Lenfest Dep., at 89:14-90:5, 95:9-15; Def. Ex. 46, S. Burke Dep., at 24:23-25:1; see also Def. Ex. 22, Michael Salinger, Dir., Bureau of Econ., Prepared Statement of the FTC, before the Cmte. on the Judiciary United States Senate: Sports Programming and Cable Distribution: The Comcast/Time Warner/Adelphia Transaction (Dec. 7, 2006), at 4 (testifying that "the FTC staff determined that [Time Warner] and Comcast were not acquiring any cable assets that competed with their existing assets. In other words, the transaction eliminated no horizontal competition between the parties.")

Comcast supports its assertion by citing the rationale of the Federal Communications Commission in rejecting an objection to the Time Warner/Comcast/Adelphia Transaction that it reduced competition between Comcast and Adelphia or Time Warner. The FCC determined that, prior to the Transaction, Comcast did not compete directly with Adelphia or Time Warner because each offered cable services in adjacent franchises and, thus, consumers did not have the ability to choose between them.[15] (See Def. Ex. 16, Time Warner/Comcast/Adelphia Order, ¶ 82.) Similarly, the FCC rejected an objection to the Comcast/AT&T/MediaOne Transaction on the ground that Comcast and AT&T, or AT&T and MediaOne were competitors, finding that actual competition exists only among cable firms that overbuild each other's franchise areas and that there was no evidence that Comcast and AT&T, or AT&T and MediaOne, would have overbuilt one another in the ab-

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15 The FCC's Time Warner/Comcast/Adelphia Order stated, in response to an objection to the proposed merger that:

> In DMAs where both Time Warner and Comcast currently operate, however, they generally do not compete directly for subscribers. Their systems usually operate in adjacent franchise areas within a DMA, and consumers do not have the ability to choose between them. Accordingly, the elimination of Time Warner's or Comcast's presence in a particular DMA does not likely indicate the loss of head-to-head competition.

(Def. Ex. 16 ¶ 82.) The Class concedes that the FCC approved the transaction, but contends that neither the FCC's approval nor its legal conclusion are proper evidence of competition. (Counterstatement of Facts ¶ 33.)

sence of the transactions.[16] (See Def. Ex. 15, AT&T/Comcast Order, ¶ 94; Def. Ex. 14, MediaOne

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[16] In approving the Comcast/AT&T Transaction, the FCC stated:

> CFA offers no evidence to suggest that AT&T and Comcast would overbuild each other's cable systems such that the proposed merger would diminish competition in these local franchise areas. Applicants deny having any intentions to overbuild, and confirm that they have not overbuilt in each other's franchise areas, with the exception of the few non-consolidated affiliate systems. Accordingly, we cannot conclude from the record that AT&T and Comcast had intentions of overbuilding each other's local markets, or that they were likely to do so.

(Def. Ex. 15 ¶ 94.) In the AT&T/MediaOne order, the FCC found:

> BellSouth argues that the merger will eliminate current and future MVPD competition between AT&T and MediaOne in local areas where the Applicants have overlapping or adjacent cable franchise areas. BellSouth contends that, in the absence of the proposed merger, AT&T and MediaOne would build over ("overbuild") each other's cable systems, thereby offering consumers in those areas two MVPD cable choices. However, we find no evidence in the record to suggest that AT&T and MediaOne would overbuild each other's cable systems such that the proposed merger would diminish competition in these local areas.
>
> . . .
>
> Since the initial acquisition of the Fayetteville and Powder Springs overbuilt systems, the system owners have not constructed anymore overbuilds, and there is no evidence to suggest that AT&T and MediaOne would overbuild one another absent the merger. AT&T and MediaOne hold overlapping franchise authority in 13 other areas, but have no overbuilds in these areas. There is no evidence that they would overbuild each other in these areas absent the

[Footnote continued on next page]

Group, Inc., 15 FCC Rcd 9816 (2000) ("AT&T/MediaOne Order"), ¶¶ 94-95.) Finally, Comcast asserts that the swap agreements did not contain non-compete or other enforceable provisions restricting Comcast or the Counterparties from reentering the area and competing with one another. However, as noted, the Lenfest acquisition agreement involved a contractual covenant not to compete binding upon Gerry Lenfest, and other family member owners of Lenfest.

The Class responds that each Counterparty offered the same product in the same geographic market; namely, each operated as an MVPD distributor at the same level of the market within the Philadelphia DMA, and therefore were actual competitors prior to the Transactions. Its economics expert, Dr. Michael A. Williams, opines that Comcast and each of the Counterparties were competitors because they engaged in the same business in the same product market and geographic market. (Williams Decl. ¶ 164; Expert Reply Decl. Of Michael Williams, Ph.D. ("Williams Reply Decl.") ¶ 15 (stating that at least eight cable companies provided service in the Philadelphia DMA in areas adjacent to Comcast franchises, before being acquired by Comcast)).

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> merger. We find that the proposed merger is unlikely to diminish MVPD competition between the Applicants to a degree that would warrant the denial of the Application or the imposition of conditions.

(Def. Ex. 14 ¶¶ 94-95.) The Class concedes that the FCC approved the transactions, but contends that neither the FCC's approval nor its legal conclusion are proper evidence of competition. (Counterstatement of Facts ¶ 34.)

Comcast's internal documents show that the company itself viewed other MSOs as its competitors. (See Pl. Ex. 134 (Comcast internal emails identifying companies that are Comcast's major competitors.)) Comcast required the CEO of Lenfest to sign a non-compete agreement as part of the Lenfest acquisition. According to Dr. Williams, the non-compete clause "demonstrate[s] that in Comcast's view, the relevant geographic area where these individuals represented a continuing competitive threat to Comcast was not only larger than [a local franchise area], it was larger than the footprints [in which the companies had previously provided service] . . . showing that Comcast viewed MVPD companies in these neighboring geographic locations as competitors and/or potential competitors, even though Comcast was not an incumbent cable provider in those locations at that time." (Williams Decl. ¶ 79-80.)[17]

Comcast also viewed other MSOs as competitors for the purchase of cable assets and customers. (Pl. Ex. 32, "Minutes of a Special Mtg. of Bd. of Directors of Comcast Corp. of May 4, 1989, at COM PA1151021 (describing the arrangement by which Comcast and AT&T agreed to abandon their competition to purchase MediaOne's cable assets and, instead, "reach[ed] an amicable and acceptable alternative to another round of competitive bids," involving a swap of various AT&T and Comcast cable assets resulting in the addition of 750,000 subscribers for Comcast.)

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[17] Dr. Williams also notes that a non-compete agreement was executed between Comcast and executives at Prime Communications, as part of a loan agreement. (Williams Decl. ¶ 23.) There is no evidence that Prime Communication was involved in any of the acquisition or swap transactions.

Dr. Williams cites the MediaOne transaction, as well as the competition between Comcast, Lenfest and Mediacom for Marcus Cable's Eastern Shore Systems, and the competition between Comcast and several other MSOs for the assets of Cablevision systems in Ohio, Massachusetts and Michigan, to support his assertion that Comcast competed with the Counterparties to acquire cable assets before they were themselves acquired by Comcast. (Williams Decl. ¶ 122.) Brian Roberts, Comcast's CEO, also acknowledged that Lenfest, prior to its acquisition, was a potential competitor for other cable systems in the Philadelphia DMA. (Pl. Ex. 93, Roberts Dep., 231-32.)

Finally, the Class contends that Comcast's competitors also considered other MSOs to be competitors. For example, AT&T Board of Directors' internal documents list other MSOs, including Comcast, as competitors. (Pl. Ex. 101, October 1999 AT&T Bd. of Directors Mtg., "Competitive Cable TV Statistics"; Pl. Ex. 102, March 1999 AT&T Bd. of Directors Mtg. "Acquisition of 50% Interest in Lenfest Communications Executive Summary".) Gerry Lenfest likewise testified that Comcast was a "competitor in acquiring systems," although he stated that Comcast was not a direct competitor for subscribers. (Pl. Ex. 90, Dep. of Harold Lenfest on November 18, 2008, 89:10-25.)[18]

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[18] The Class makes additional arguments that Comcast also competed with other MSOs for original cable franchises and engaged in "benchmark competition" with other MSOs. We have already rejected these portions of the Class expert's market structure analysis. (See Class Cert. Mem. at 18 (rejecting theory of competition for the award of original franchises because all awards occurred before the class period); id. at 51-52

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B. Evidence of Potential Competition.

Comcast also argues that the Class cannot create a genuine issue of material fact that the transactions eliminated any potential competition between itself and the Counterparties because there is no evidence that it or any Counterparty ever intended to enter another's market as an overbuilder. Comcast asserts that the Class has produced no evidence that Comcast, Lenfest, or any of the other Counterparties intended to overbuild one another in the Philadelphia DMA at some future time. (See 10/15 Tr. 84:24-85:16; Def. Ex. 59, Williams Dep., 105:9-106:18.[19]) It also asserts that there is no evidence that any Counterparty had any intention of overbuilding Comcast or took affirmative steps toward doing so. Rule 30(b)(6) representatives of Lenfest and AT&T, the only two Counterparties deposed by Plaintiffs, each testified that the companies had no intention of overbuilding Comcast, had not taken any affirmative steps toward doing so, and did not consider overbuilding to be economically viable. (See 10/14 Tr., 140:9-14; Def. Ex. 52, Lenfest Dep., 82:25-85:3, 89:23-90:5; Def. Ex. 51, Hindery Dep., 181:7-23.)

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(rejecting theory of benchmark competition as not capable of proof at trial through common evidence).)

[19] Dr. Williams conceded that, in reviewing all of the documents and depositions in the case, he had seen no business plan suggesting that Comcast or another MSO was planning to overbuild another MSO in the Philadelphia DMA. (Def. Ex. 59, Williams Dep., 105:9-106:18.)

Comcast also asserts:

- It had no interest in, or intent to, overbuild any Counterparty nor had it taken any affirmative steps toward doing so, such as seeking to obtain the necessary franchise approvals, building out infrastructure, setting aside capital for that purpose or otherwise performing any planning whatsoever for such a move, because Comcast did not consider overbuilding to be an economically viable business model. (See Def. Ex. 46, S. Burke Dep., 13:7-14:8, 52:16-57:7; Def. Ex. 56, Roberts Dep., 173:4-174:24.)
- Its pricing decisions were not based on a concern that other MSOs might overbuild Comcast. (See Def. Ex. 46, S. Burke Dep., 207:14-20; Def. Ex. 50, Doyle Dep., 183:14-23; Def. Ex. 57, Deposition of David Scott on December 3, 2008 ("Scott Dep."), 107:19-108:6.)
- There is no evidence that any of the Counterparties based their pricing decisions on Comcast prices. To the contrary, Gerry Lenfest testified that Lenfest did not base its pricing decisions on a concern that Comcast might overbuild Lenfest franchise areas. (Def. Ex. 52, Lenfest Dep., 70:8-16, 72:6-73:16, 90:21-91:9.)
- The Federal Communications Commission determined in evaluating several of the Transactions that the merging entities had no intention of overbuilding one another's franchise areas, nor were they likely to do so. (See Def. Ex. 15, AT&T/Comcast Order, ¶ 94;

Def. Ex. 14, AT&T/MediaOne Order, ¶¶ 94-95.)

Based upon these averments, Comcast argues that the Class cannot demonstrate a jury issue that any Counterparty's presence on the fringe of a Comcast franchise prior to the merger, tempered Comcast's competitive behavior.

The Class responds that it has produced evidence that there was a "potential for incumbent MSOs in the Philadelphia DMA to overbuild each other's territories, since they have done so in other markets," and that the FCC recognizes that adjacent cable operators are the most likely entrants. (Counterstatement of Facts ¶ 36). To support its factual assertions of potential overbuilding in the Philadelphia DMA, the Class relies upon specific instances of overbuilding in **other** parts of the country;[20] deposition testi-

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[20] See Counterstatement of Facts ¶ 8. The Class cites overbuilding that occurred in **New York City** (Pl. Ex. 89, Hindery Dep., 95-96); **Dover, Delaware** (where Storer Cable, a competitor to a corporate predecessor of Marcus Cable – itself now a Comcast corporate predecessor – overbuilt approximately 500 homes) (Pl. Ex. 27 at COM-PA0776597); **Terre Haute, Indiana** (where 20-25% of Time Warner's territory had been overbuilt by Charter) (Pl. Ex. 23 at COM-PA1130645); **Tampa, Florida** (where an Adelphia franchise was overbuilt by Time Warner) (Pl. Ex. 35); **Kalamazoo, Michigan** (where Cablevision overbuilt approximately 300 homes served by Adelphia) (Pl. Ex. 40 at COM-PA1835049); **Ann Arundel County, Maryland** (where Millenium Cable and AT&T had overbuilt each other's areas representing 50,000 homes passed) (Pl. Ex. 92 at 294-95; Pl. Ex. 103 at COM-DOJ273974-75); **City of Aventura, Florida** (where a Comcast area was overbuilt by Cablevision and Comcast overbuilt AT&T areas) (Pl. Ex. 120 at COM-PA1082923); **Alameda, California** (5,300 homes overbuilt by Comcast) (Pl. Ex. 124 at COM-PA1267909); **Newman County,**

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mony from Leo Hindery that it is not uncommon for MSOs to overbuild each other's franchise areas (Pl. Ex. 89, Hindery Dep. at 95-96); an assertion by its expert, Dr. Williams, that "there's certainly a potential for the incumbent MSOs in the Philadelphia DMA to overbuild each other's territories because they have done it in other places, (Pl. Ex. 100, Williams Dep. at 46-47); and the FCC's Thirteenth Annual Report, which states that "clustering can present a barrier to entry for the most likely potential overbuilder, (i.e. an adjacent cable operator)" (Pl. Ex. 146, Thirteenth Annual Report ¶ 180 (parenthetical in original)). It asserts that, to the extent that Comcast and other MSOs avoid overbuilding adjacent franchise areas, record evidence shows that they do so as part of, and in support of, collusive and illegal agreements to allocate cable markets.

C. Analysis

We find that the Class has produced evidence from which a jury could find in its favor on the section 1 claim's requirement that Comcast conspired with competitors to allocate markets. Comcast's assertions that the Counterparties were not its actual competitors – because each operated cable systems in

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Georgia (18,000 subscribers overbuilt by Charter and Comcast) (Id. at COM-PA1267922); **Oshtemo County, Michigan** (Cablevision overbuilt an Adelphia franchise area) (Pl. Ex. 133 at COM-PA1835049); **Orlando, Florida area** (Brighthouse overbuilt an Adelphia franchise area) (Pl. Ex. 106 at COM-PA00011036); **Powhatan, Virginia** (80,000 homes overbuilt by Adelphia) (Pl. Ex. 112 at COM-PA0374859); and **Dolthan, Alabama** (6,500 homes in a Comcast franchise area overbuilt by Time Warner) (Pl. Ex. 125 at COM-PA1382980).

their own respective, non-overlapping franchise area, and never offered services to the same subscribers, at the same time, anywhere in the Philadelphia region – would have some purchase had we determined that the relevant geographic market was the individual franchise area. However, in the class certification proceedings, we specifically rejected the opinion of Comcast expert Dr. Teece that the relevant geographic market should be pegged at the franchise level or, alternatively at the even smaller household level because the Class showed that it could establish by common evidence that the relevant geographic market should be the DMA.[21] Importantly, Comcast has not challenged at the summary judgment stage the Class's position that the relevant geographic market is the DMA.

We find that the Class need not show that Comcast competed with the Counterparties in the same franchise areas for those Counterparties to be deemed its actual competitors. Rather, based upon the proposed market definitions, it is sufficient that each provided MVPD services in the Philadelphia DMA. Were we to agree with Comcast's assertion that parties to an alleged market allocation scheme must have actually competed with one another for the same customers irrespective of market definitions, bizarre results could ensue. Assume, for example, that two firms at opposite ends of the country

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[21] We concluded that "[b]ecause the record evidence shows that consumers throughout the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from Comcast's clustering conduct in the Philadelphia DMA, we find that it can be the appropriate geographic market definition." (Class Cert. Mem. at 14-15.)

– who have never grown so large as to be able to expand to the center of the country – agree they will never cross the Mississippi River to directly compete with one another. In a suit against both firms asserting a nationwide geographic market definition, their agreement would satisfy all of the elements of an illegal horizontal market allocation. But each firm could immunize itself from antitrust liability merely by agreeing to the allocation early enough to avoid being deemed direct competitors. Clearly, the teaching of Palmer and Topco prohibits this result. See Palmer 498 U.S. at 49-50 (noting that "[t]he defendants in Topco had never competed in the same market, but had simply agreed to allocate markets"). Given the relevant product and geographic market definitions presumed by Comcast, it necessarily follows that each Counterparty could be its actual competitor in the market.[22] Accordingly, we conclude that Comcast's contentions that (1) each company operated within its own respective, non-overlapping franchise area, and (2) never offered services to the same subscribers at the same time anywhere within the Philadelphia DMA, cannot eliminate the Class's market allocation claim as a matter of law where the Class has created a genuine issue of material fact

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[22] We reject Comcast's reliance upon Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 174-75 (2006) and Feesers, Inc. v. Michael Foods, Inc., 498 F.3d 206, 214 (3d Cir. 2007). Volvo Trucks and Feesers were not Sherman Act market allocation cases. Rather they were decisions construing Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), involving claims of price discrimination by a manufacturer against entities in the market position of a wholesaler. See Volvo Trucks, 546 U.S. at 171; Feesers, 498 F.3d at 208-11.

that each company offered MVPD services in the Philadelphia DMA prior to the swap transactions.

We find, however, that the Class has failed to meet its summary judgment burden to create a genuine issue of material fact that Comcast or a Counterparty was a potential overbuild competitor. The two variants of potential competition theory apply section 7 of the Clayton Act to prohibit mergers and acquisitions by one company with another if "the effect of such acquisition may be substantially to lessen competition." United States v. Marine Bancorporation, 418 U.S. 602, 622 (1974).[23] The Class's assertion

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[23] As we stated in the class certification proceedings,

> Under the first theory, "perceived potential competition," the Supreme Court held that competition might be diminished if a company that industry participants had thought might actually enter the market on its own, instead simply acquired a company already in that market. See Marine Bancorporation, 418 U.S. at 625 ("[T]he Court has interpreted § 7 as encompassing what is commonly known as the 'wings effect'– the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter de novo. . . . The elimination of such present procompetitive effects may render a merger unlawful under § 7."). Under these cases, "perceived potential competition focuses on the premerger effect on prices of the perception that if profits rise, a new company will enter the market and drive down both prices and profits." Alberta Gas Chemicals Ltd. v. E.I. Du Pont De nemours and Co., 826 F.2d 1235 (3d Cir. 1987).
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> . . .
>
> The actual potential competition doctrine has not received a clear stamp of validity from the Supreme Court, but other courts have applied it where the plaintiff can show: (1) that the relevant market is oligopolistic; (2) that absent the

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that overbuilding has occurred in other markets does not create a genuine factual issue that there was any potential for overbuilding in the Philadelphia DMA among the transaction Counterparties prior to the mergers. Evidence that other MSOs in other parts of the country engaged in overbuilding, and evidence that neighboring MSOs are the most likely overbuilder entrants, is insufficient to establish a genuine issue of material fact on whether (1) the transaction Counterparties here would likely have entered a competitor's franchise area in the near future as a potential overbuilder had they not been acquired by Comcast or (2) that they had any intention to potentially overbuild each others' franchise areas, when the record evidence of those parties' intentions is directly to the contrary. Accordingly, we conclude that the section 1 rule of reason claim may proceed on the Class's theory that Comcast and the Counterparties were "competitors" prior to the Transactions, but not upon its theory that they were potential overbuild competitors.[24]

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> acquisition [of the incumbent cable operator], the acquiring company [Comcast] would likely have entered the market in the near future either de novo or through a toehold acquisition; and (3) that such entry by the acquiring company [Comcast] would carry a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects. Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982) (citing Marine Bancorporation, 418 U.S. at 630, 633).

Behrend v. Comcast, 245 F.R.D. 195, 207 (E.D. Pa. 2007).

[24] We also find that the Class, to the extent that it raises the issues, cannot rely upon other forms of competition identified by

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V. SECTION 2 CLAIM – PREDATORY CONDUCT

The Third Amended Complaint contains two claims under section 2 of the Sherman Act,[25] monopolization (Count II) and attempted monopolization (Count III)[26]. The Class identifies two types of allegedly predatory conduct to support its section 2 claims: Comcast's clustering conduct and its conduct toward RCN, a cable overbuilder that attempted to overbuild Comcast franchises in Delaware County, Pennsylvania. (Compl. ¶¶ 83-103.) Comcast argues it is entitled to summary judgment because its clustering strategy had legitimate business justifications, and, accordingly, cannot be deemed to be predatory anticompetitive conduct. It asserts that the Class has failed to meet its summary judgment burden to create a genuine issue of material fact that the transactions creating the cluster, either singly or col-

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its expert Dr. Williams, namely benchmark competition, competition for original cable franchises, and competition for bargaining power with programming content providers, which we have previously rejected as unsupported by evidence common to the class.

[25] Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations" is guilty of an offense and subject to penalties. 15 U.S.C. § 2.

[26] Comcast argues with respect to both claims that the Class has failed to show predatory conduct. Accordingly, our analysis of the two section 2 claims is identical for the purposes of the Motion.

lectively, lacked a legitimate non-pretextual business purpose. Additionally, it argues that its conduct in relation to RCN was not predatory or exclusionary, and that no jury could find that either (1) Comcast's conduct in licensing Comcast SportNet Philadelphia ("CSN Philadelphia") to RCN, (2) RCN's inability to engage contractors, or (3) Comcast's price discounts to potential RCN subscribers, constituted predatory conduct.[27] Rather, it asserts, the summary judgment record demonstrates that RCN's inability to compete in the Philadelphia DMA resulted from its own financial difficulties in raising capital. The Class responds that it has presented ample evidence demonstrating the transactions were anticompetitive and lacked valid business justifications. It also asserts

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[27] In the class certification proceedings, we rejected two other theories presented by the Class to demonstrate predatory conduct. We rejected the Class's assertion that Comcast's anti-RCN lobbying activity could be used as proof of predatory conduct, because it was at odds with the Noerr-Pennington doctrine. (Class Cert. Mem. at 46 (citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965) (holding that an individual is immune from antitrust liability for exercising First Amendment right to petition the government)).) We also extensively discussed the issue of Comcast's conduct in denying access to its DBS competitors to CSN Philadelphia in the last class certification opinion, which was based on the same record currently before us on summary judgment. We rejected Dr. Williams' and Dr. Singer's opinions tying Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration rates as susceptible to proof at trial through available evidence common to the class. (Id. at 26-28.) In its summary judgment brief and in its Counterstatement of Facts, the Class concedes that these issues have been rejected and does not reraise them, other than to preserve an objection to the prior rulings.

that genuine issues of fact exist regarding Comcast's conduct toward RCN.

The elements of a section 2 monopolization claim are (1) the possession of monopoly power and (2) the willful acquisition and maintenance of that power as distinguished from growth or development or consequences of a superior product, business acumen, or historical accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc., 159 F.3d 129, 141 (3d Cir. 1998). The elements of section 2 attempted monopolization are (1) that the defendant has a specific intent to monopolize, and (2) that the defendant has engaged in anticompetitive conduct that, taken as a whole, creates (3) a dangerous probability of achieving monopoly power. West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 108 (3d Cir. 2010) (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)).[28] The distinction between the two claims is that "monopolization requires proof of monopoly power, while attempted monopolization requires only proof of a dangerous probability of achieving a monopoly. Courts interpret the latter requirement to imply a showing of market share somewhat less than that required for

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[28] To determine whether there exists a viable claim of monopolization or attempted monopolization, a court must inquire into the relevant product and geographic market. Spectrum Sports, Inc., 506 U.S. at 459. We have already held in the class certification proceeding that the Class can establish through common evidence its definitions that the relevant product market is the provision of multichannel video programming service ("MVPS") and the relevant geographic market is the Philadelphia DMA. For the purposes of its summary judgment motion, Comcast does not challenge these definitions.

monopoly power." 2 Kintner, Federal Antitrust Law § 14.9.

The possession of monopoly power "will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasis deleted); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) ("the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor"); Morris Comm'ncs Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004) ("Unlawful monopoly power requires anticompetitive conduct, which is 'conduct without a legitimate business purpose that makes sense only because it eliminates competition.'" (quoting Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 804 (8th Cir. 1987))); LePage's Inc. v. 3M, 324 F.3d 141, 153-54 (3rd Cir. 2003). Antitrust conduct, also called exclusionary conduct or predatory conduct, "is central to the offenses of both monopolization and attempted monopolization." 2 Kintner, Federal Antitrust Law, § 14.9. The analysis of predatory conduct is the same under both sections. Id.

Courts follow a sequential analysis in examining predatory conduct. First, the burden of proof of demonstrating predatory conduct and anticompetitive effect rests on the plaintiff. United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (citing Monsanto, 465 U.S. at 763). If a plaintiff successfully demonstrates anticompetitive conduct, the defendant must demonstrate a "procompetitive justification" for its conduct. Id. at 59 (citing Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 (1992)). A "procompetitive justification" is a

"nonpretextual claim that [the monopolist's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal. . . ." Id., see also LePage's Inc., 324 F.3d at 163 ("'In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons . . . , while the desire to maintain a monopoly market share or thwart the entry of competitors would not.'" (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994))) (alteration in original); see also 2 Kintner, Federal Antitrust Law § 14.35 ("practices that harm other firms without harming competition, or that harm rivals because of the defendant's superior efficiency cannot constitute unlawfully exclusionary conduct in the attempt context.")[29]. Once the defendant has met its burden to demonstrate a valid business justification,[30] the burden shifts back

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29 Kintner explains,

> In considering exclusionary practices, it is critical to bear in mind that all competition excludes. Every act of innovation, price cutting, new entry or expanded output harms competitors, excluding them from some part of the market, sometimes to the point of destruction. But the antitrust laws actively promote this kind of harm to competitors. . . . [I]t is only when firms engage in practices that are *inefficiently* exclusionary – practices that predictably will lead to lower output and higher prices by reducing competition in the market as a whole – that antitrust law may intervene to enjoin or penalize the conduct.

2 Kintner, Federal Antitrust Law, § 14.14.

30 At least one court has held that the question is **not** whether the business justification is sufficient, but merely whether de-

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to the plaintiff to show that the proffered business justification is pretextual. See Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1212 (9th Cir. 1997).[31]

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fendant establishes it had one. Bell v. Dow Chem. Co., 847 F.2d 1179, 1186 (5th Cir. 1988) (stating that the Supreme Court's decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985) "does not hold that a jury can weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal in or order to find intent by a defendant to monopolize. . . . The fact determination that may be left to a jury is whether the defendant has a legitimate business reason for its refusal, *not* whether that reason is sufficient. The Aspen jury presumably found all of [defendant's] business justifications to be unpersuasive, *not* persuasive but insufficient.").

[31] We note that in Microsoft the United States Court of Appeals for the District of Columbia Circuit offered an alternative route to demonstrating that the conduct was predatory, holding that "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." Microsoft, 253 F.3d at 59; see also Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 422 (D. Del. 2006) (stating that Microsoft's rubric allowed alternate means to plaintiff to rebut defendant's justification: as pretextual or, alternatively, by demonstrating that the anticompetitive harm of the conduct outweighs the procompetitive benefit). The Third Circuit has never specifically adopted this alternative. See e.g., United States v. Dentsply Intern., Inc., 399 F.3d 181, 187, 196 (3d Cir. 2005) (acknowledging business justification defense to predatory conduct claim without mentioning balancing) (citing LePage's Inc. 324 F.3d at 152); Broadcom Corp., 501 F.3d at 318 (same). Other post-Microsoft appellate decisions have also been silent on whether this alternative is available. See e.g., Morris Comme'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004) (holding that once the defendant has met its

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burden to show its valid business justification, the burden shifts to the plaintiff to show that the proffered business justification is pretextual); ACT, Inc. v. Sylvan Learning Sys., Inc., 296 F.3d 657, 670 (8th Cir. 2002) (holding that when a valid business reason exists for the conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a section 2 violation; plaintiff's evidence did not create a triable jury question on whether defendant's proffered business reasons were legitimate); see also 3 Areeda and Hovenkamp, Antitrust Law, § 658 (3d ed. 2007) (noting generally that few decisions have discussed the burden shifting issue in any detail).

In their discussion of the section 2 issues, neither party relied upon the alternative balancing test, made any argument that the test is applicable under Third Circuit case law, or attempted to apply the test to the summary judgement record. Moreover, the Class initially advised the Court that it was not relying upon the alternative balancing test. (N.T. 4/2/12 at 3:16-5:3.) However, in a later correspondence, the Class noted that, as part of its argument that Comcast lacked a valid business justification, it had argued in a footnote that a reasonable jury could conclude that the harm caused by Comcast's anti-competitive conduct "far overshadowed" any claimed business justification. (See Pl. Mem. at 72 n.55.)

We find that any reliance upon the alternative balancing test was waived. The Class's footnote was entirely devoted to the pretext issue, not the balancing test. Moreover, arguments "raised in passing (such as, in a footnote), but not squarely argued, are considered waived." John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp., 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (finding cursory arguments contained in footnote in appellate brief were waived). The Class's correspondence, issued after it had stated on the record that it was not relying upon the test, is insufficient to raise an argument that it did not include in its formal brief. See Acumed LLC v. Advanced Surgical Servs., Inc., 561 F.3d 199, 223 (3d Cir. 2009) (holding that a party has sufficient notice before a summary judgment is entered against it if it had reason to believe that the court might reach the mat-

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A. Creation of the Philadelphia cluster.

1. Has the Class created a genuine issue of material fact that the creation of the Philadelphia DMA cluster was predatory?

The Class contends that building the Philadelphia cluster was predatory conduct because it was accomplished through the use of the swap agreements to allocate the market between Comcast, AT&T and Time Warner. (Compl. ¶ 83.) In addition to the evidence already discussed, the Class points to Dr. Williams' opinions that the swaps and acquisitions caused large increases in Comcast market share and market concentration. Its market share rose from 23.9% in 1998 to 77.8% in 2Q2002, ending at 69.5% in 4Q2007. (Williams Decl. ¶ 114.) Williams opined that Comcast "would be expected to exercise substantial market or monopoly power, unless barriers to entry were low." (Id. ¶ 117.) However, he opined, there exist substantial barriers to entry into the MVPD market, both wire-based and satellite, including substantial sunk capital cost, strategic behavior by incumbents designed to raise their rivals' costs, such as limiting programming availability, local and state level regulations, and technological limitations. (Id. ¶ 118.) Dr. Williams contends that, among the anticompetitive results from Comcast's acquisition of

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ter at issue on the pending summary judgment application and the party had an opportunity to support its position fully); Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999) (holding that an issue is waived if it is not raised in a party's initial appellate brief).

market power from its clustering the Philadelphia DMA was its ability to deter overbuilding. (Id. ¶ 131; Williams Supp. Decl., Table 5; see also Singer Reply Decl. ¶¶ 42-59.) Because, Dr. Williams opines, the presence of an overbuilder restrains cable prices (see Williams Decl. ¶ 133 and App. IV), the Class contends there is ample evidence from which a reasonable jury could conclude that Comcast's clustering of the Philadelphia DMA decreased overbuilding and led to increased prices. Relying upon the Supreme Court's decision in Grinnell Corp., the Class argues that the swaps transactions are thus sufficient proof of anticompetitive conduct, standing alone, to permit a jury to find for the Class on its section 2 claims.

In Grinnell, the Court held that acquiring competitors in order to perfect a monopoly is predatory conduct. 384 U.S. at 576[32]; see also 2 Kintner, Fed-

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[32] The Court stated:

> We have said enough about the great hold that the defendants have on this market. The percentage is so high as to justify the finding of monopoly. And, as the facts already related indicate, this monopoly was achieved in large part by unlawful and exclusionary practices. The restrictive agreements that pre-empted for each company a segment of the market where it was free of competition of the others were one device. Pricing practices that contained competitors were another. The acquisitions by Grinnell of ADT, AFA, and Holmes were still another. Grinnell long faced a problem of competing with ADT. That was one reason it acquired AFA and Holmes. Prior to settlement of its dispute and controversy with ADT, Grinnell prepared to go into the central station service business. By acquiring ADT in 1953, Grinnell eliminated that alternative. Its control of the three other defendants eliminated any possibility of an outbreak of competition that might have occurred when the 1907 agreements terminated. By those acquisi-

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eral Antitrust Law § 14.13 ("The conduct element of the monopolization offense can be satisfied by a merger (or series of mergers) to monopoly or by inefficient exclusionary conduct. . . . An acquisition or series of acquisitions that threaten to achieve monopoly power may establish the requisite conduct and specific intent for an attempt to monopolize."). Because the Class has presented evidence creating genuine issues of material fact that (1) the swaps resulted in a dominate market share, (2) the anticompetitive results from Comcast's acquisition of market power from its clustering the Philadelphia DMA included its ability to deter overbuilding and (3) the presence of an overbuilder restrains cable prices, the Class may rely upon the transactions themselves and evidence of Comcast's resultant increase in market share as proof of predatory conduct.

2. Has Comcast stated a "procompetitive justification" for its conduct?

Comcast argues it is entitled to summary judgment on the section 2 claim because it had legitimate, procompetitive justifications in creating the Philadelphia cluster, and the Class has failed to create a triable issue negating this claim. Based on the evidence already discussed in conjunction with the arguments on the *per se* claim, Comcast argues that each transaction was undertaken for valid business purposes. It argues that its decision to create a clus-

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tions it perfected the monopoly power to exclude competitors and fix prices.

Grinnell, 384 U.S. at 576.

ter in the Philadelphia DMA was undertaken to achieve greater efficiency, a prototypically valid business purpose.

Comcast asserts that contemporaneous Comcast documents identify the efficiencies and advantages associated with clustering, including opportunities in the areas of general management, new product introductions, marketing, brand building, retail presence, ad sales, government and community relations, local programming, call centers, training, and business communications services. (Def. Mem. at 34-35; Def. Ex. 29, "Clusters/2000 Management Retreat Memo.," at COM-PA0214427-28 (outlining management opportunities created by large clusters, including general management, new product introduction, marketing, ad sales, government/community relations, local programming, call centers and training); Def. Ex. 28 (same).) It adds that testimony confirmed that clustering enabled Comcast to realize marketing efficiencies by increasing its presence across a DMA (thereby enabling its self-advertising to reach a wider audience), and to realize other efficiencies such as consolidating infrastructure, operations, call centers, and management. (Def. Statement of Undisputed Facts ¶¶ 46-47; Def. Ex. 56, Roberts Dep., 116:2-117:16[33]; Def. Ex. 50, Doyle Dep., 90:3-92:3 (stating

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[33] CEO Roberts testified that among the advantages of clustering were

economies of scale and improved consumer benefits. And I would say that those two categories are what I've been talking about with clustering, that I think in '99 you – depending on the scale, now this total acquisition would have done what I said earlier, make us substantially larger, so we would have qualified for programing discounts.

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that a benefit of clustering was the ability to recruit better people and manage business more efficiently); Def. Ex. 53, Marshall Dep., 32:24-33:22 (stating that a benefit of clustering was better ad sales and economies of scale).) As noted in the discussion of *per se* liability, Comcast asserts that clustering also allowed it to introduce new products such as high-speed internet, telephone, pay per view, video on demand, digital video recorders, digital cable, substantially more channels, and high-definition television. (Def. Statement of Undisputed Facts ¶ 48.) The economies of scale associated with clustering enabled cable providers to compete with satellite companies with a national footprint, and telephone companies possessing vastly larger resources and clusters, who

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> We would be able to consolidate managers within a market. We'd be able to open up call centers within those markets, that would be open 24 hours a day, instead of kicking over to an answering service at night. When most people watch television, historically, that's how cable service was provided. Now you had a much larger area, and you're able to use new technology, as well as have a bigger scale of operations.
>
> We are able to recruit better executives because it's closer to the caliber of being a TV station general manager. Often considered the best job in media was to run one of the local markets, because you had the entire market in the broadcast industry or the radio industry, or the newspaper industry, or frankly, the phone industry. You were in charge of either a state or a city. So heretofore, we would have, you know, lower paid, smaller area of line of responsibility. So there's a myriad of benefits that happened in that situation.

Def. Ex. 56, Roberts Dep., 116:2-117:16

were emerging as competitors in multiple product markets – video, data, and telephone. (Id. ¶ 49; Def. Ex. 54, Pick Dep., 56:1-57:23; Def. Ex. 51, Hindery Dep., 132:11-15; Def. Ex. 56, Roberts Dep., 144:23-146:7.). We find that Comcast has stated procompetitive justifications for its clustering conduct.

3. Has the Class created a genuine issue of material fact that the proffered business justification for clustering is pretextual?

The Class does not dispute that Comcast has identified efficiencies purportedly associated with clustering. (Counterstatement of Facts ¶ 46.) Rather, the Class asserts that Comcast did not present evidence that it conducted any post-transaction studies to see whether its assumptions about efficiencies were correct and there is no evidence in the record creating a genuine issue of material fact that the transactions actually resulted in increased efficiency for Comcast. It argues that a reasonable jury could conclude from Comcast's "lack of interest" in whether its stated justification was true that its claimed efficiency justification was pretextual. (Class Pl. Mem. at 70.)

In contrast to the lack of evidence of actual efficiencies, the Class argues that the evidence creates a genuine issue of material fact that, with each transaction Comcast raised its prices, suggesting that the claim of efficiency is pretextual. (Class Pl. Mem. at 72-73 (citing Pl. Ex. 6, "Analysis of Adelphia New Jersey Rates," at COM-PA0513589 (stating "it appears that Adelphia's rates could rise about $8.53 to be in line with Comcast's rates."); Pl. Ex. 126, Peyton Email of March 30, 2006 (stating with regard to the Adelphia/Time Warner swap transaction that a "fac-

tor[] driving the brand transition timing" was "[a] desire to take as many scheduled rate increases as possible under the existing Adelphia or TW system name."); Pl. Ex. 5, "Rating Agency Presentation January 2002," at COM-PA0206424 (noting that operating cash flow per former subscriber of E. W. Scripps, Jones Intercable and Lenfest increased, on average, 30% within one year of Comcast's acquisition of those systems.); Pl. Ex. 130, "Key Messages," (noting after integration of AT&T systems revenues increased by 9.8%, operating cash flow by 22.9%, margins by 8.2 points, and operating cash flow per subscriber by 23.4%; after integration of Adelphia systems revenues increased by 15.3%, operating cash flow by 28%, margins by 12 points, and operating cash flow per subscriber by 23.4%); Pl. Ex. 113, Presentation of Brian Roberts at Salomon Smith Barney 12 Annual Entertainment, Media & Telecommunications Conference, at COM-PA0470175 (stating that "in every other acquisition we've been able to get the Comcast margin to 42 percent within two years"); Pl. Ex. 123, Announcement of Adelphia and Time Warner Transactions, at COM-PA1137177-178 (showing acquired Adelphia systems' operating cash flow margin increasing from 30% to 39% after acquisition, showing history of increases after AT&T and prior Adelphia acquisitions).) When asked about projecting revenues models after completing acquisitions, Robert Pick testified that Comcast "generally assume[d] there [would] be rate increases in the – over the modeling period." (Pl. Ex. 92, Pick Dep., 87:2-4.) David Scott, Comcast's executive vice-president of finance and administration, testified that Comcast's cable headquarters "directionally" advised how much it expected companywide prices to increase in its budgeting model each year, while allowing individual fran-

chises to vary across the country. (Pl. Ex. 96, Scott Dep., 26:22-28:14.)

The Class also asserts that Comcast did not need to allocate markets in order to achieve efficiency; that it could have built its cluster by overbuilding its competitors rather than acquiring them or swapping for their assets. (Pl. Mem. at 75-76.) It argues that a reasonable jury could find that Comcast's decision to pursue efficiency through swaps and acquisitions, rather than through overbuilding, harmed competition, was unnecessarily restrictive, and was thus anticompetitive, even if Comcast was allegedly engaging in those transactions in pursuit of increased efficiency.

Comcast responds that (1) the Class cites no authority for its assertion that a company claiming efficiency must conduct formal studies to establish that its goal was achieved, (2) the Class itself elicited testimony that Comcast had achieved efficiencies, (3) the Class's experts conceded that clustering can lead to efficiencies, (4) the FCC concluded that clustering increased efficiencies, and (5) the Class itself elicited testimony that obvious efficiencies were observed by Comcast after the transactions.[34] It points out that it

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[34] Robert Pick testified in response to a question by Class counsel about whether Comcast studied whether its estimated efficiencies were realized that,

> I'm not aware – I'm not sure or at least I'm not aware of any specific studies that were done to see if they were achieved or not achieved. Some of them obvious were obvious. For instance, I think in the operating efficiencies, we assumed that we could bring margins of the AT&T systems to that level close to or similar to the Comcast system.

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raised cable prices annually both before and after the transactions, in both legacy and in newly acquired franchises. (Def. Sup. Ex. 93, S. Burke Dep., 44:5-20, 45:5- 8.[35]) Thus, it argues that its intention to raise prices after acquiring systems does not establish pretext. It also emphasizes that it is undisputed that it introduced new services into its acquired territories that were not previously available, like digital cable, DVRs, and telephone and internet service.

We find that the Class has not met its summary judgment burden to create a genuine issue of material fact that Comcast's claim of efficiency as a justification for clustering was a pretext. The Class's evidence that Comcast raised prices does not refute the claim of efficiency. While the Class did not have to present direct evidence establishing pretext to meet

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> And so it's just obvious that you could see during the financial – looking at financial results that if the margins of those things approved – improved at or close to Comcast systems, you would see that we were able to do that.

(Pl. Ex. 92, Pick Dep., 305:12-22.)

35 COO Burke testified that

> Basic cable rates in virtually every system in every cable company in every state in the country are raised every year because our programming costs go up every year. And, so, there were basic rate increases I would say in virtually all of the systems in the Philadelphia area every year during the period of time.
>
> . . .
>
> We raise prices every year because our programming increases every year.

(Def. Sup. Ex. 93, S. Burke Dep., 44:5-20, 45:5-8.)

its summary judgment burden, it had to present probative evidence that would demonstrate the existence of a triable issue of fact upon which a reasonable jury could disbelieve what Comcast asserts. It has tried to do this by arguing that Comcast could have achieved the same efficiency of clustering by overbuilding its competitors, rather than acquiring them or swapping for their assets, and asserting that Comcast never studied whether it was achieving its goals. We reject these contentions for several reasons.

First, the underlying assumptions – that clustering efficiencies can be similarly created through overbuilding, and that creating a cluster through overbuilding is an equally efficient business model – are unsupported by any evidence. Second, the fact that Comcast could have achieved efficiencies differently is insufficient to show that Comcast's efficiency justifications were a pretext. Third, there is no authority that an antitrust defendant's expectations of efficiency proved accurate. Similarly, the fact that Comcast did not study its efficiencies is also insufficient to show that the efficiency justification was a pretext. Moreover, the evidence in the record supports the fact that clustering in fact leads to efficiencies of scale.[36] Finally, the Class does not dispute

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36 See Def. Ex. 18, Seventh Annual Competition Report, ¶ 166 (clustering "permits cable operators to . . . gain efficiencies related to economies of scale and scope resulting in lower administrative costs, enhanced deployment of new technologies, and encouraging the extension into previously unserved areas"); Def. Ex. 19, FCC 01-389, Eighth Annual Competition Report, ¶ 14 ("By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony.").

that Comcast was able to provide significant new services to its customers as a result of clustering.

Accordingly, we grant summary judgment to Comcast on the Class's section 2 claim regarding Comcast's clustering conduct. The Class has failed to create a genuine issue of material fact that Comcast's proffered business justification was pretextual.

B. RCN

As noted above, the Class argues that Comcast's conduct toward RCN was predatory in three respects: (1) its conduct blocking RCN's access to cable infrastructure installation contractors, (2) its conduct in licensing CSN Philadelphia to RCN, and (3) its practice of offering price discounts to potential RCN subscribers. We shall examine each claim individually.

1. Access to cable infrastructure installation contractors.

a. Has the Class created a genuine issue of material fact that Comcast's actions blocking RCN's access to cable infrastructure installation contractors were predatory?

In June 1998, RCN sought and received certifications to operate Open Video Systems[37] ("OVS") in four counties in the Philadelphia DMA (Delaware,

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[37] An OVS is a "facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community. . . ." 47 C.F.R. § 76.1500(a).

Bucks, Chester, and Montgomery). (Def. Statement of Undisputed Facts ¶ 54.) Of those four counties, RCN chose to enter Delaware County first, breaking ground on its overbuild cable system in the Borough of Folcroft in late 1999. (Id. ¶ 55.) From there, RCN continued its overbuilding throughout Delaware County. In 2000, RCN overbuilt in Folcroft, Ridley Township, Eddystone, Norwood, Sharon Hill, Prospect Park and Collingdale. In 2001 RCN overbuilt in Glenolden, Ridley Park, Upper Darby, Colwyn, Morton, Tinicum Township, Clifton Heights, Darby Township and Darby Borough. In 2002, RCN overbuilt in Rutledge, Milbourne, East Lansdowne and Lansdowne. In 2003, RCN overbuilt in Yeadon. (Id. ¶ 57; Def. Ex. 41, Laura Burke Deposition Exhibit 13.).)

On May 29, 2002, RCN sent a letter to the FCC complaining that "it [was] aware of no less than fifteen (15) contractors in the Philadelphia market – representing virtually all of the viable construction and installation contractors in the area – whom Comcast or, prior to its acquisition by Comcast, Suburban Cable, have prevented or tried to prevent from doing business with RCN."[38] (Def. Ex. 43, RCN 30(b)(6) Dep. Ex. 22 at RCN 0000237.) After Suburban merged into Comcast, those Suburban personnel responsible for the company's contractor non-compete policy "went to work for Comcast, where the practice of intimidating contractors continued." (Id. at RCN 0000238.) Scott Burnside, RCN's Senior Vice President for Regulatory and Governmental Affairs,

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[38] Dr. Singer, a class expert, opined that the fifteen area contractors constituted approximately 53% of the available contractors in the Philadelphia area. (Singer Decl. ¶ 124.)

testified that RCN suffered "delays and setbacks by not having full cooperation from the outside contractors that it would normally expect to have." (Pl. Ex. 83, Burnside Dep., 81:13-16.)

James Cleaver, an installation subcontractor who had worked for Suburban Cable, testified that several subcontractors who had worked for Comcast were barred from further work when Comcast became aware that they were working as subcontractors for his company on the RCN build out. (Pl. Ex. 84, Cleaver Dep., 61:9-77:22.) When Cleaver's company began working for RCN as a subcontractor, he received an email from Chris Patterson of Suburban Cable, which was about to be acquired by Comcast. (Def. Ex.43, RCN 30(b)(6) Dep. Ex. 22, at RCN0000241.) Patterson told Cleaver:

> You suggest that Suburban did not have a problem with you working for other area cable companies and you were right, because they were not in direct competition with Suburban Cable as RCN is. Every mile of rear buss plant that you build gives RCN, our competitor the ability to take customers away from Suburban Cable. Our company and the Cable industry does not share the same perspective that you do in regards to competition.
>
> . . .
>
> You are correct, you are a business man and as we discussed on the phone you need to take the proper business decisions for your company. In my opinion your business decision should have been to stay with Suburban and become a part of our major project. You

> also know that we will become part of a larger cluster under Comcast ownership which will span the Tri-state area and south through Baltimore and Washington. You need to know that they have a more intense feeling about competing with RCN than Suburban does, and our intensity is pretty strong. Why you choose to work for a smaller company such as RCN in light of things to come are more of a short term decision vs looking at the long term in this area with Comcast. Again, you made a business decision for your company any your employee's [sic] and that is fine. Suburban had to act on a legal document that you signed for Non-compete. This is the only reason why Suburban terminated your contracts, because it was in breach.

(Id.) Cleaver testified on cross examination at his deposition that when he worked for Suburban Cable he had access to the company's design plans and used Suburban's equipment. (Def. Ex. 48 Cleaver Dep. 101:14-25.) He understood that Suburban had concerns because its design plans were confidential and also concerns about equipment being mixed up with the equipment of other companies. (Id. at 101:14-104:7.) He also testified that he currently continues to get work from Comcast, even though he also works for RCN and Verizon. (Id. at 79:13-17.) Finally, Cleaver testified that RCN paid contractors higher rates "because they wanted to lure whoever [sic] they could, and the only way you are going to get them on is to pay the money." (Pl. Ex. 84, Cleaver Dep., 118:2-23.)

Notwithstanding the evidence of RCN's complaint to the FCC and the Burnside and Cleaver testimony, Comcast offers evidence that by April 2001, RCN was able to complete its buildout in Delaware County, achieving a penetration rate of 20 – 21%, which was above its 20% minimum target required to keep its operations viable and generate a return. (Def. Statement of Undisputed Facts ¶ 58; *Def. Ex.* 55, RCN Rule 30(b)(6) Dep., 62:12-18.) It adds that, when deposed by the Class, RCN did not identify any barriers to entry created by Comcast in the Philadelphia DMA; instead, RCN's 30(b)(6) designee stated that the only barriers to entry RCN faced in entering the Philadelphia DMA were (i) physical access to the poles that were owned by the utilities to build its system and (ii) obtaining a franchise from each municipality to provide the service. (Def. Statement of Undisputed Facts ¶ 59; Def. Ex. 55, RCN 30(b)(6) Dep., 47:17-49:4, 55:11-21.) The Rule 30(b)(6) witness testified that the company had not experienced "any lack of contractors" at the hands of Comcast, and that it was able to retain all the cable construction and installation contractors necessary to build out its cable systems in Delaware County. (Def. Statement of Undisputed Facts ¶ 67-69; Def. Ex. 55, RCN 30(b)(6) Dep., 152:24-153:1; see also Def. Ex. 47, Burnside Dep., 158:25-159:13.[39]) Comcast has also

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[39] After offering direct testimony that RCN had suffered set backs and delays due to Comcast's interference with contractors, on cross-examination at his deposition, RCN executive Scott Burnside confirmed the testimony of the Rule 30(b)(6) witness:

> Q. And you testified about access to contractors. RCN was able to get contractors to build out in Delaware County, right?

[Footnote continued on next page]

presented evidence that the pool of cable installers and construction contractors available to build out cable systems in Eastern Pennsylvania numbered in the hundreds, including both locally-based contractors and national companies. (Def. Statement of Undisputed Facts ¶ 66; Def. Ex. 48, Deposition of James Cleaver on May 14, 2008 ("Cleaver Dep."), 114:23-117:16; Def. Ex. 40, Cleaver Dep. Ex. 9.) Comcast notes that RCN stated to the FCC that Comcast had exclusive arrangements with only 15 of these contractors. (Def. Ex. 43, RCN 30(b)(6) Dep. Ex. 22 at RCN 0000237.)

Although RCN complained to the FCC that Comcast had tied up fifteen installation contractors with non-compete agreements, the record contains evidence of only two signed contractor non-compete agreements – the one discussed in the Cleaver deposition between Suburban Cable TV Co. (which was later acquired by Comcast) and Installation Technologies, Inc. ("ITI"), dated April 22, 1999 and terminat-

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[Footnote continued from previous page]

. . .

> THE WITNESS: To some degree, yes.
> BY MR. KORPUS:
> Q. To a degree sufficient to build out its system in Delaware County to its specifications, right?
> MR. WOODWARD: Objection. Form.
> THE WITNESS: To do construction in Delaware County, they were able to get construction people willing to do work in Delaware County.

(Def. Ex. 47, Burnside Dep., 158:25-159:13.). Burnside also testified that some contractors left Comcast to work for RCN because they did not like Comcast's "bullying tactics." (Id. at 160:25- 161:11.)

ed on November 26, 1999, (Def. Ex. 39, Cleaver Deposition Exhibit 6); and another between Suburban and Lewis Communications dated April 9, 1999. (Def. Statement of Undisputed Facts ¶ 71; Def. Ex. 43, RCN 30(b)(6) Dep. Ex. 22 at RCN000242-45.) Both non-compete agreements were executed before the class period. Those provisions prohibited the contractors from working for anyone besides Comcast during the term of the principal contract in geographic areas where Comcast faced competition. (Def. Ex. 43; Def. Ex. 39.) In the Suburban/ITI contract, the term of the non-compete extended for six months after termination of the contract, i.e., May 2000. (Def. Statement of Undisputed Facts ¶ 73; Def. Ex. 39.) It is undisputed that Comcast never brought an action to enforce this provision and ITI continued to work for RCN after Comcast terminated the contract for cause. (Def. Statement of Undisputed Facts ¶ 74; Counterstatement of Facts ¶ 74.) The Suburban/Lewis non-compete only lasted for the duration of the contract. Moreover, it is undisputed that, when asked by Comcast to honor the agreement, Lewis instead chose to work for RCN. (Def. Statement of Undisputed Facts ¶ 75; Counterstatement of Facts ¶ 75.)

Comcast also presents evidence that RCN's tenuous financial condition, rather than any problems it experienced with the availability of contractors, caused the company to ultimately abandon its efforts to overbuild in the Philadelphia DMA. In December 2000, while its build-out of Delaware County was underway, RCN announced that, in order to conserve cash, the company had abandoned its plans to enter any new markets where it did not already provide video service. This announcement applied nationwide – not just to Philadelphia. (Def. Statement of

Undisputed Facts ¶ 80; Def. Ex. 45, RCN 30(b)(6) Dep. Ex. 34.) RCN confirmed in its public filings pursuant to the federal securities law and in statements to the FCC that it had abandoned plans to engage in further overbuilding (in Philadelphia or elsewhere) because it lacked the necessary capital. (Def. Statement of Undisputed Facts ¶ 81-83; Def. Ex. 3, RCN 2001 10-K405, p. 51.; Def. Ex. 42, RCN 30(b)(6) Dep. Ex. 8 (Initial Comments of RCN Corp. in re Annual Assessment of the State of Competition, dated August 3, 2001), p. 7; see also Def. Ex. 47, Burnside Dep., 170:7-171:22.) Consistent with the announced change in its strategy, RCN did not start any new overbuild construction, and instead actually sought to free itself from its build-out obligations in the Philadelphia DMA and elsewhere. RCN did not even build out franchise areas where it already had franchise approvals and therefore the legal obligation to build. (Def. Statement of Undisputed Facts ¶ 84; Def. Ex. 3, RCN 2001 10-K405, p. 20, 52; Def. Ex. 55, RCN 30(b)(6) Dep., 159:9-160:13; Def. Ex. 3, RCN 2001 10-K405, p. 20, 26; Def. Ex. 4, RCN 2002 10-KA, p. 22, 28; Def. Ex. 5 RCN 2003 10-K, p. 32; Def. Ex. 6, RCN 2004 10-K, p. 16; Def. Ex. 7, RCN 2005 10-K, p. 19.) Among the areas affected by RCN's strategic retrenchment were communities in Bucks County where RCN had franchise approvals and build out obligations. In 2002 and 2003, due to its continuing net losses and ongoing inability to raise capital, RCN reiterated in its public disclosures that it would not be able to honor its build-out requirements in certain communities across the country, including in Eastern Pennsylvania. (Def. Statement of Undisputed Facts ¶ 88; Def. Ex. 3, RCN 2001 10-K405, p 20, 24, 51-52; Def. Ex. 4, RCN 2002 10-KA, p. 22, 26-27; Def. Ex. 5, RCN 2003 10-K, p. F-1, F-26,

F-29, F-39; Def. Ex. 55, RCN 30(b)(6) Dep., 164:20-165:6, 167:20-168:24.) In May 2004, RCN filed for bankruptcy. (Def. Statement of Undisputed Facts ¶ 89; Counterstatement of Facts ¶ 89.) Even after emerging from bankruptcy, RCN's financial problems persisted, and its losses continued to mount. It is undisputed that, in May 2005, RCN disclosed that it was continuing its efforts to terminate or renegotiate franchise agreements in communities across the country, including Eastern Pennsylvania, to avoid breaches and related penalties, and announced that it expected to continue to experience net losses "for the foreseeable future." (Def. Statement of Undisputed Facts ¶ 93; Counterstatement of Facts ¶ 93.)

The Class does not dispute that RCN was suffering from financial problems. It contends that RCN, in part, blamed its problems on "the inability to secure, or the uncertainty about whether it will be able to secure, essential programming," (Def. Ex. 42, Initial Comments of RCN Corp to FCC, p. i-ii) and that RCN repeatedly complained to the FCC about Comcast. It contends that RCN's financial problems are evidence of the toll Comcast exacted on its competitor through its anticompetitive conduct in the Philadelphia DMA, i.e, by limiting RCN's access to contractors, as well as its conduct in targeting price discounts to prospective RCN subscribers – which we discuss below – Comcast raised RCN's costs. (See Singer Merits Reply Decl. ¶ 34 ("Comcast's contractor-foreclosure strategy directly raised RCN's costs of supplying MVPD service in the Philadelphia DMA and thereby provided Comcast with an artificial cost advantage vis-a-vis RCN. Dr. Teece's proposed remedy – importing contractors from distant areas – is also an example of raising rivals' costs."); see also Teece Decl. ¶ 176 (finding that "a number of Phila-

delphia area contractors chose to work solely (or mostly) with RCN," but noting also that "RCN apparently paid contractors more than Comcast in order to incentivize them to work with RCN.").)

Drawing all inferences in favor of the Class as the non-moving party, we find that the Class has succeeded in creating a genuine issue of material fact that Comcast acted with predatory intent regarding RCN's access to cable infrastructure installation contractors. There is a genuine issue of fact with regard to the reasons why RCN encountered problems in its build out in Delaware County. Comcast's evidence showing a larger pool of contractors, that RCN was able to complete its build out in Delaware County with available contractors, that Comcast never enforced non-compete agreements with contractors, and that RCN's problems arose from its lack of capital, does not establish that it is entitled to judgment as a matter of law on the issue. The contrary evidence Comcast presents merely counters the Class's evidence; it does not establish that no jury could find predatory conduct on the part of Comcast if it chose to believe the Class's evidence.

b. Has Comcast stated a "procompetitive justification" for its conduct?

Comcast's stated justification for "tying up" contractors with non-compete clauses is that it utilized non-compete clauses with contractors to protect its proprietary customer information, confidential design plans, and equipment. (Def. Statement of Undisputed Facts ¶ 76; Def. Ex. 46, S. Burke Dep., 167:15-168:21; Def. Ex. 48, Cleaver Dep., 103:18-104:4 (acknowledging that Comcast personnel expressed concerns about confidential design plans and

mixing up equipment on the same truck)). Comcast's Steve Burke testified generally that the company was concerned that an installation contractor, who had access to Comcast's customer lists, might also work for DirecTV or RCN:

> we don't like the fact that you have names of our customers and now you are doing business with DirecTV, and the potential for somebody to make a bigger commission by doing business with DirecTV than Comcast, all of a sudden we lose a customer. So I think it's totally appropriate to tell a contractor, you know, we have enough work for 50 people, you work for us, we don't want you working for our competitor. But I don't know in the specific case of RCN whether that was done in Philadelphia.

(Def. Ex. 46, S. Burke Dep. 167:16-168:1.) He added,

> It's not a matter of company policy that if a company does work for anyone else they can't do work for us, but just as a matter of common business sense, if someone – if you have someone who is doing a lot of business with you and a lot of business with one of your competitors and you suspect that that is damaging you because they are taking your names and customers to someone else, boy, if I was running a system in Sarasota, Florida, I would stop it.

(Id. 168:13-22.) We find that Comcast has stated a legitimate procompetitive justification for its conduct with regard to cable infrastructure installation contractors.

c. Has the Class created a genuine issue of material fact that the proffered business justification is pretextual?

We find that the Class has failed to create a genuine issue of material fact that Comcast's stated justification was a pretext for predatory conduct. Indeed, in its summary judgment brief, the Class does not address Comcast's justifications for imposing no-compete terms on cable installers, i.e., the need for cable companies to protect their customer lists, design plans, and equipment.[40] Accordingly, we conclude that the Class has failed to meet its summary judgment burden on the issue of whether Comcast's justifications for requiring no-compete clauses by cable infrastructure installation contractors were pretextual.

2. RCN's access to CSN Philadelphia.

The Class contends that CSN Philadelphia, Comcast's regional sports network, is "must have" programming needed by MVPDs, including RCN, to compete in the Philadelphia DMA. (Pl. Ex. 83,

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40 We note that Dr. Singer addresses the issue in his declaration, opining that "[t]here does not appear to be a compelling justification for [the contractor no-compete] conduct, as one Comcast official noted to another that 'I am not entirely sure what problem a[n] [exclusivity] program would be designed to solve' and that exclusive contracting 'has not bubbled up from the field as an urgent need and so I am not sure what we are trying to fix.'" (Singer Decl. ¶ 112 (quoting COM-PA1456482).) While it is unclear whether Dr. Singer was aware of Comcast's stated justifications when he stated there did not appear to be one, his opinion denying that Comcast had stated any justifications is not supported by the record.

Burnside Dep., 83:14-85:12.) The Third Amended Complaint alleges that Comcast initially refused to provide RCN, and then provided only on a short-term basis, access to Comcast SportsNet Philadelphia, refusing to enter into a stable, multi-year license for the content until only shortly before the Third Amended Complaint was filed. (Compl. ¶¶ 86-90.) The Class asserts that RCN's initial attempt to license CSN Philadelphia was "initially rebuffed," and that Comcast later indicated it would terminate RCN's access to CSN Philadelphia during the time period that it was building out its Delaware County communities. (Counterstatement of Facts ¶ 61; Pl. Ex. 97, RCN 30(b)(6) Dep., 69:16-20; Pl. Ex. 118.) It presents evidence that, during this time frame when RCN was attempting to sign up customers in its new operating areas, Comcast call center workers were directed to tell subscribers cancelling in favor of RCN that RCN will no longer have the right to carry Comcast SportsNet after October 1, 2000. (Pl. Ex. 81, S. Burke Dep., 123:6-19; Pl. Ex. 83, Burnside Dep., 116:22-118:8). While conceding that "Comcast eventually allowed RCN access to the 'must-have' programming on a series of short term, month-to-month contracts," it characterizes this arrangement as "outside the industry norm." (Counterstatement of Facts ¶ 61 (citing Pl. Ex. 135, Letter of April 16, 2001, p. 6.).)[41]

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41 We note that the summary judgment record includes testimony from Scott Burnside that Comcast used CSN Philadelphia to create an entry barrier. Burnside, referring to the month-to-month contract period, testified "it gave Comcast some leverage . . . over RCN and where RCN might go into other competitive – other communities in that greater Philadelphia market. (Pl. Ex. 83, Burnside Dep., 104:23-105:2.; but see Def.

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Ex. 47, Burnside Dep., 114:18-21 (stating "RCN still does have the programming required to be competitive because they are there and competing on a daily basis."); see also Def. Ex. 55, RCN 30(b)(6) Dep., 49:5-15 (stating that obtaining programming is not an entry barrier)).

However, we find that the evidence cited for the "outside the industry norm" proposition, as well as the claim that Comcast told RCN it would terminate its access to CSN Philadelphia, is taken out of context. CSN Philadelphia's CEO Jack Williams informed RCN on May 25, 2000 that, due to changes in the cost of programming, the market, and the needs of Comcast's affiliates, Comcast would not be able "to extend its arrangement with your system **at the price and on the other terms and conditions currently in effect** when your agreement expires this coming October." (Pl. Ex. 118, Letter of May 25, 2000 (emphasis added).) The letter states that this same notice was being given to all CSN Philadelphia affiliates. The Class concedes that RCN received a long-term contract executed in December 2003, and made effective as of October 1, 2001, the termination date of its prior long-term contract. (Pl. Ex. 79.)

The contention that the intervening short-term contracts were "outside the industry norm" is based upon a letter Comcast CEO Brian Roberts sent to Senator Arlen Specter. In describing Comcast's relations with RCN, he stated that RCN "has had, and continues to have, a contractual agreement to carry Comcast SportsNet on its systems in the network's greater Philadelphia service area;" that in "October 2000, *every* Comcast SportsNet affiliate was offered a six-month carriage renewal (through March 2001), after which the carriage agreement would remain in place on a continuous, month-to-month basis; while this month-to-month agreement is in place, either Comcast SportsNet or the affiliate has the right to terminate the agreement on 90 days' notice." (Pl. Ex. 135, Letter of April 16, 2001, p. 6 (emphasis in original).) Roberts told Specter that Comcast did this "to assure affiliates of continuous service while the company reviewed its business plan and structure"

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In his report, Dr. Singer opined that Comcast sought to deny RCN access to CSN Philadelphia, and then sought to raise its rival's costs by artificially inflating the price, once the FCC determined that Comcast was required to provide access to its wireline competitors. (Singer Decl. ¶ 97.) Dr. Singer opines that, "[e]ven though Comcast ultimately was compelled to supply RCN with [CSN Philadelphia], the episode reveals Comcast's anticompetitive intent and highlights the competitive implications of such exclusionary conduct in the downstream market." (Singer Decl. ¶ 100.)

Comcast responds that RCN has had access to CSN Philadelphia continuously from before the class period to the present day and that RCN's own corporate designee testified that lack of access to CSN Philadelphia programming did not constitute a barrier to entry for RCN into the Philadelphia DMA. (Def. Statement of Undisputed Facts ¶ 61; Def. Ex. 55, RCN 30(b)(6) Dep., p. 127:17-22; Def. Ex. 47, Burnside Dep., 143:16-144:12.) It adds that RCN had a "most-favored-nation" clause guaranteeing that it

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and Roberts stated that Comcast advised RCN that, on completion of that review, it would offer "*all* affiliates a standard new contract whose terms and length will be consistent with established industry practices." (Id. (emphasis in original).) The Class reads the statement that the new contract would "be consistent with industry standards" as evidence that the interceding month-to-month arrangement was outside the norm. This characterization ignores the evidence, undisputed by the Class, that the interceding arrangement was imposed on all affiliates and was instituted by Comcast "to assure affiliates of continuous service while the company reviewed its business plan and structure." (Id.)

would receive CSN Philadelphia on terms no less favorable than those provided to other licensees. (Def. Statement of Undisputed Facts ¶ 63; Def. Ex. 31, 32.) Comcast asserts that it licensed the programming to RCN, its competitor, on exactly the same terms offered to all CSN Philadelphia licensees (including Comcast Cable itself). (Def. Statement of Undisputed Facts ¶ 64; Def. Ex. 49, Deposition of Joseph Donnelly on November 19, 2008 ("Donnelly Dep."), 162:15-19 (stating "I can tell you that the Comcast SportsNet rates in Philadelphia are the same for everybody. And there are competitors, people who are, like Verizon who get it and pay the same rate as we do, RCN who pays the same rate as we do."); Def. Ex. 60, Deposition of Jack Williams on December 16, 2008 ("Jack Williams Dep."), 45:20-46:2; 69:12-18; Def. Ex. 55, RCN 30(b)(6) Dep. 139:6-12, 141:16-143:20.) The "short-term" agreements, which were the same for all licensees, occurred only during a one-year period when Comcast was conducting an internal review of pricing strategy. (Def. Statement of Undisputed Facts ¶ 65; Def. Ex. 60, Jack Williams Dep., p. 45:8-46:23 (stating "When RCN came on in Philadelphia, we offered a contract that would expire at the same time of all the other contracts. That contract was then extended for a year, as were all of the others.").)

Construing the evidence in the light most favorable to the Class, we find that the Class has failed to create a genuine issue of material fact that Comcast acted with predation toward RCN with regard to its carriage of CSN Philadelphia. While the Class contends that Comcast acted with predation toward RCN because it was overbuilding Comcast's Delaware County franchises, the Class failed to create a genuine issue of material fact that Comcast treated

RCN differently from all of its other CSN Philadelphia affiliates during the relevant time frame. Comcast advised each affiliate that its contract would not be renewed on the existing terms; it offered each affiliate short term contracts extending their carriage during the period in which Comcast was reassessing its terms of carriage; and it eventually offered RCN – like every other affiliate – a long term carriage contract back dated to the end of the prior long term contract, with no interruption in service. Information provided by Comcast call center workers to prospective RCN subscribers, that RCN had access to CSN Philadelphia on a short term basis, was truthful and there is no evidence that Comcast offered dissimilar information to inquiries from non-RCN prospective subscribers. The Class offered no evidence to create a genuine issue that Comcast threatened to cancel RCN's carriage or that Comcast acted "outside the industry norm" in placing all of its affiliates on short term carriage contracts while it reassessed its terms of carriage. Accordingly, we find that the Class has failed to create a genuine issue of material fact that Comcast acted with predatory intent in dealing with RCN's carriage of CSN Philadelphia.

3. Targeted price discounts.

Finally, the Class asserted in the Third Amended Complaint that Comcast's policy of offering targeted price discounts to prospective RCN customers to convince them not to switch service was predatory conduct. (Compl. ¶¶ 93-94.) The summary judgment record shows that, beginning in the winter of 2000 when RCN was about to offer service in Folcroft, Delaware County, Comcast offered discounts in the form of the "Comcast Advantage Plan" or "CAP" to

customers in Folcroft. CAP offered a price freeze and free premium channels for eighteen months to customers who signed a written agreement not to cancel service during that period. (Def. Statement of Undisputed Facts ¶ 77-78; Counterstatement of Facts ¶ 77.) Customers who switched to another provider or otherwise terminated the contract incurred a termination penalty ranging from $30 to $75 dollars. (Pl. Ex. 2 at COM-PA0982337; Pl. Ex. 81, Dep. of Laura Burke of April 25, 2008 ("L. Burke Dep.") 37:13-38:4.) Comcast did not use written contracts for customers in any other franchise area in the Philadelphia DMA at the time it offered CAP to customers in Folcroft. (Pl. Ex. 81, L. Burke Dep., 42:4-17.) The early termination penalty was also unique to CAP. (Id. at 44:13-17.) Comcast enforced the penalty, collecting the termination fee by including it as a separately itemized line on the customer's monthly cable bill. (Pl. Ex. 81, L. Burke Dep., 92:3-93:11.) Although it began offering CAP in Folcroft, Comcast adjusted and changed the program over time, extending the offer to other areas that RCN entered as an overbuilder. (Id. at 97:4-99:3.)

The purpose of CAP was to keep customers from switching cable providers. (Pl. Ex. 85, Dep. of Frank Dingianni of June 25, 2008 ("Dingianni Dep."), 19:22-24.) Specifically, Comcast

> wanted to hold RCN at bay. . . . There was a certain percentage number that they were trying to hit, that they thought that RCN wouldn't be able to survive. . . . If they held them under 30 percent . . . . The amount of subscribers that RCN could get out of the areas and then maintain profitability. . . .

> [T]here was a break point where they wouldn't be viable, RCN.

(Id. at 40:8-19, 42:22-24.) In Folcroft, an area "[s]wept by CAP reps in March/April," as of June 2000, Comcast was able to sign up 70% of its subscribers to CAP contracts; for Ridley Township, which was "[s]wept by CAP reps in May/June," Comcast was able to sign up 77% of its subscribers to CAP contracts. (Pl. Ex. 1, "Marketing Overview".) Dr. Singer opined for the Class that

> Comcast believed that RCN's minimum viable scale was a 50 percent penetration rate. . . . Comcast documents demonstrate that Comcast's CAP program held RCN to 10 percent penetration, and that the CAP program ensured that RCN could not under any circumstances achieve a penetration rate of more than 16 percent. By holding RCN to a penetration rate below this minimum viable scale, Comcast ensured that RCN's business model was doomed to fail. Facing these "unfavorable economics," RCN would incur a loss on every subscriber it successfully wrested from Comcast. Accordingly, Comcast's exclusionary conduct significantly impaired competition from RCN.

(Singer Merits Reply Decl. ¶ 41.) According to Dr. Singer, because of the price freeze in RCN areas and increased prices in non-RCN areas, "Comcast customers in RCN areas received rates that were18 to 38 percent below the rate paid by Comcast customers in non-RCN areas. The implications of this disparate pricing policy are clear – but for RCN's failure to enter the City of Philadelphia, Comcast's customers in

those areas would have enjoyed significantly lower prices." (Singer Decl. ¶ 115.)

Comcast responds that CAP was a purely voluntary program, which subscribers were free to accept or reject. It notes too that the Class's own expert opined that price discounts in response to entry by a new competitor are a consumer benefit of competition. (See Williams Decl., ¶¶ 142-43, Table 6.[42]) Finally, it asserts, and the Class does not dispute, that there is no evidence that the prices charged under CAP were lower than any relevant measure of Comcast's costs. (Def. Statement of Undisputed Facts ¶ 78; Counterstatement of Facts ¶ 78.) It argues that, irrespective of the evidence marshaled by the Class that Comcast specifically targeted CAP to maintain its subscriber base against incursion by RCN, its CAP pricing cannot be deemed predatory absent evidence that Comcast offered cable services below cost to drive RCN out of the market.

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[42] In the section of his report entitled "Incumbent Cable Operators Reduce Rates when Competitors Enter," Dr. Williams opines

> The evidence illustrates, through individual pricing decisions, how incumbent cable operators responded to new entrants. The econometric analyses reviewed above establish that competition lowers rates, while the evidence shown in the table illustrates how incumbent cable operators compete for subscribers using lower rates and other promotional incentives. Comcast's anticompetitive conduct, which created and increased barriers to entry, reduced the extent of that entry, which would have required Comcast to offer such lower rates and promotions.

(Williams Decl., ¶ 143.) As evidence supporting his opinion, Dr. Williams specifically cites the CAP program in Folcroft. (Id., Table 6.)

We find that the fact that Comcast never charged below cost prices to potential RCN customers does not mandate a summary judgment finding that CAP was not exclusionary conduct. While Comcast is correct that section 2 claims based upon predatory pricing require evidence that the defendant has cut prices below some measure of its costs in providing the product, see Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23 (1993) ("a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs"), the theory upon which the Class proceeds is not that Comcast's pricing policy was predatory. The Class asserts that CAP constituted predatory conduct because it was an exclusionary practice, entered into by a monopolist, to block the entry of a new competitor.

The Class has presented evidence that CAP was an exclusivity arrangement, that its purpose was to prevent RCN from attaining market penetration by locking up customers to an incentivized long term commitment to receiving their MVPD services from Comcast, and included penalty provisions if a customer chose to switch providers. An exclusivity arrangement by monopolists can constitute an exclusionary practice. LePage's Inc., 324 F.3d at 157 (citing U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993)[43]. An exclusionary

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[43] In addition to relying upon the decision in LePage's, Inc., the Class cites to Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1139-40 (10th Cir. 2002) to also support the proposition that conduct by a monopolist to lock up customers with long term contracts in anticipation of competition is exclu-

[Footnote continued on next page]

practice is "'a method by which a firm . . . trades a part of its monopoly profits, at least temporarily, for a larger market share, by making it unprofitable for other sellers to compete with it.'" Id. at 164 (alteration in original) (quoting Richard A. Posner, Antitrust Law: An Economic Perspective 28 (1976)). In discussing the antitrust impact of an exclusivity arrangement in the form of bundled rebates, the *en banc* court in LePage's, Inc. held that "[w]hen a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general." Id. at 159. Most importantly, LePages's, Inc. rejected the proposition advanced by 3M and repeated here by Comcast that "after Brooke Group, no conduct by a monopolist who sells its product above cost — no matter how exclusionary the conduct — can constitute monopolization in violation of § 2 of the Sherman Act." Id. at 147. LePage's, Inc. unequivocally closes the door in this Circuit on an assertion that above cost pricing safe-harbors otherwise exclusionary conduct.

[Footnote continued from previous page]

sionary. The case is inapposite. At the referenced pin cite, the United States Court of Appeals for the Tenth Circuit, discusses whether the "state action doctrine" immunized conduct under state antitrust law, declining to reach the question because "it is clear that no state policy expressly permitted Southwestern Bell to attempt to lock up customers contractually long beyond the November 1996 introduction of competition in an effort to stymie that competition." Id. The Court was clearly discussing an inapposite doctrine concerning an inapposite state law issue.

While a new entrant may engage in "promotional" activity, such as offering a discount in exchange for a period of exclusivity, or offering below cost pricing in the short term in order to introduce itself or a new product to the market, "[w]hen a firm has considerable market power in the very product or service being promoted, the promotional pricing defense disappears." 3A Areeda and Hovenkamp, Antitrust Law, § 746 (3d Ed. 2008); see also id. at § 1807 (discount contracts are "problematic" when the defendant is a dominant firm in a position to force "an all-or-nothing choice"). The Class has created a genuine issue of material fact that Comcast, a firm possessing market power, was able to lock up 70% to 77% of the potential customer base available to the new entrant. Because it possessed market power, its decision to target promotional discounts to deter a new entrant may be deemed predatory and an exercise of market power to maintain its monopoly. As Comcast makes no arguments that CAP had otherwise legitimate business justifications, we conclude that the claim must be submitted to a jury.[44]

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[44] We note that Comcast asks that, in the event we should only find that there is a genuine issue of fact as to whether its conduct toward RCN was predatory, we amend our class certification order to limit the Class to subscribers residing in Delaware County. (See Def. Mem. at 50-51.) Because we conclude that the Class may present to a jury its section 1 rule of reason claim that Comcast's clustering conduct unreasonably restrained trade, as well as its section 2 monopolization claim based upon the targeted discounts in Delaware County, we find no cause to amend our order.

VI. ANTITRUST INJURY

We have previously determined that proof of antitrust impact of the section 1 and section 2 claims must be limited to the one theory the Class successfully demonstrated could be proved by evidence common to the Class, namely, that Comcast's clustering conduct deterred the entry of overbuilders in the Philadelphia DMA. (Class Cert. Mem. at 45-47; Order of January 13, 2010 at ¶ 11.) Comcast argues that summary judgment should be entered on all claims because the Class has failed to create a trial issue on this sole remaining theory of antitrust injury.[45] Comcast argues that (1) the Class has failed to prove the antitrust impact of clustering on RCN, and (2) Dr. Williams' theories of the general antitrust

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[45] Individual antitrust injury or antitrust impact, must be established for a plaintiff to have standing under section 1 or section 2 of the Sherman Act. Bell v. Dow Chem. Co., 847 F.2d 1179, 1182 (5th Cir. 1988) (holding that "Antitrust injury is a component of the standing inquiry, not a separate qualification."). This requirement is inferred from section 4 of the Clayton Act, 15 U.S.C. § 15, which affords a remedy to any person injured in his business or property "by reason of" an antitrust violation. In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977), the Supreme Court described antitrust injury as

> . . . injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969)); see also Atl. Richfield, 495 U.S. at 342-44.

impact of clustering are purely theoretical and divorced from the factual record. It argues that some amount of empirical evidence is required to show antitrust impact; because the Class cannot present empirical evidence to support Dr. Williams' theory, the fact that the Class has successfully stated a theory should not prevent the grant of summary judgment.

Because we have found the Class has presented evidence from which a jury could find that Comcast had monopoly power derived from its creation of its cluster in the Philadelphia DMA, and acted with predation toward RCN in its targeted discounts to prospective RCN subscribers, it follows that the Class has met its summary judgment burden on the causation issue of antitrust impact. The Class has presented evidence from which a jury could find that Comcast's conduct did deter overbuilding, as well as evidence that RCN stopped overbuilding because of Comcast's conduct. Genuine issues of fact exist on both these issues rendering summary judgment inappropriate.

We also reject Comcast's arguments that the Class cannot show antitrust impact on a theory that clustering deters overbuilding in general. Comcast argues that the Class has failed to meet its summary judgment burden because it has not presented empirical evidence to support Dr. Williams' theory that clustering deterred overbuilding. (Def. Mem. at 57 (citing, among others, In re Baby Food Antitrust Litig., 166 F.3d 112, 135 (3d Cir. 1999) (holding that expert's unsupported economic theory and assumptions must be rejected where the opinion was not supported by actual record evidence); Mass. School of Law v. Am. Bar Ass'n, 107 F.3d 1026, 1040 (3d Cir. 1997) (holding that economic expert's report was

properly disregarded where it was based on general and theoretical observations and was not tied to evidence in the record)). In granting class certification, we found that, although Dr. Williams' other theories of antitrust impact were not capable of proof common to the class, his clustering theory was supported by empirical evidence and was based upon the factual record. (Class Cert. Mem. 29-47.) Dr. Williams had theorized that econometric studies showed that, "all else equal, ownership of a cable system by a large MSO (typically defined as one of the ten largest MSOs) generally results in higher [cable] rates of approximately 5% to 10%." (Williams Decl. ¶ 52.) He concluded that studies showed that an MSO "can increase its profits by clustering its cable systems so that they share their boundaries with one another and share as little total boundary as possible with other cable providers serving adjacent franchise areas. Such contiguous clustering is profit-enhancing for an MSO because it reduces the likelihood or amount of overbuilding into its franchise areas." (Id. ¶ 88.) He identified several anticompetitive consequences arising from the resulting reduction in overbuilding within the MSO's franchise areas, and supported his theories by presenting (1) two economic models of overbuilding (Williams Decl. App'x II at 107-26; Williams Cl. Reply Decl. App'x I at 13-18.), (2) citations to reports issued by the FCC and the General Accounting Office, and (3) at least six scholarly articles. (Class Cert. Mem. 34-38.)

In accepting Dr. Williams' general theory on the anticompetitive impact of clustering, we rejected competing opinions offered by Comcast's experts and concluded that the Class "has successfully shown, through Dr. Williams' model, as well as his citations to empirical studies conducted by governmental

agencies and private researchers, that the presence of an overbuilder constrains cable prices." (Class Cert. Mem. at 45-46.) We found that the Class "has also shown that Comcast engaged in conduct designed to deter the entry of overbuilders in the Philadelphia DMA, including denying RCN access to the services of cable installation contractors." (Id. at 46.) While that last portion of our decision has now been shown to be unsupported by the summary judgment record, the Class has presented the governmental and scholarly research supporting the general antitrust impact theory that clustering deters overbuilding, as well as evidence that the CAP discounts were predatory. Accordingly, we find that the Class has met its summary judgment burden of presenting evidence sufficient to create a genuine fact issue on the antitrust impact theory that clustering deters overbuilding.

VII. CONCLUSION

We find that the Class can proceed to trial on Count I of the Third Amended Complaint, the Sherman Act section 1 rule of reason claim, based upon the theory that Comcast's creation of the Philadelphia cluster through its acquisition of competing cable companies and its swapping of cable assets constituted a horizontal allocation of markets. However, *per se* treatment of the section 1 claim is rejected because Comcast has succeeded in showing that the clustering of its cable assets created pro-competitive economic efficiencies and allowed it to offer new products and services to consumers. The portions of Count II, asserting a section 2 monopolization claim, and Count III, asserting an attempted monopolization claim, which contend that Comcast acted with predation in creating its anti-RCN targeted dis-

counts, may also proceed to trial. We grant summary judgment to Comcast on those portions of Counts II and III contending that (1) Comcast's clustering conduct, (2) its conduct blocking RCN's access to cable infrastructure installation contractors, and (3) its conduct in licensing CSN Philadelphia to RCN, constituted acts of monopolization or attempted monopolization.

An appropriate order will be entered.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLINE BEHRAND, et al.	:	**CIVIL ACTION**
v.	:	
COMCAST CORPORATION, et al.	:	**No. 03-6604**

ORDER

AND NOW, this 12th day of April 2012, upon consideration of Defendants' Motion for Summary Judgment (Docket Entry 441), all responses and documents filed in connection thereto, oral argument heard by the Court on January 24, 2012, and for the reasons stated in the accompanying Memorandum, **IT IS HEREBY ORDERED** that the Motion is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Defendants' Motion is **GRANTED** insofar as it seeks judgment in Defendants' favor on

   a. Count I of Plaintiffs' Third Amended Complaint, to the extent that it asserts a Sherman Act section 1 *per se* liability claim;

   b. those portions of Counts II and III of Plaintiffs' Third Amended Complaint asserting that Comcast's (1) clustering conduct, (2) its conduct blocking RCN's access to cable infrastructure installation contractors, and (3) its conduct in licensing CSN Philadelphia to RCN, constitut-

ed acts of monopolization or attempted monopolization under Sherman Act section 2.

JUDGMENT IS ENTERED in favor of Defendants and against Plaintiffs on these claims.

2. The Motion is **DENIED** insofar as it seeks judgment in Defendants' favor on

   a. Count I of Plaintiffs' Third Amended Complaint, to the extent that it asserts a Sherman Act section 1rule of reason claim;

   b. those portions of Counts II and III of Plaintiffs' Third Amended Complaint asserting that Comcast's targeted discounts constituted acts of monopolization or attempted monopolization under Sherman Act section 2.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J

Supreme Court, U.S.
FILED
AUG 17 2012
OFFICE OF THE CLERK

SCORED
AND
BRIEFS

No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,

Petitioners,

v.

CAROLINE BEHREND, ET AL.,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

JOINT APPENDIX
Volume 3 of 5
(Pages 816a-850a)

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 11, 2012
CERTIORARI GRANTED JUNE 25, 2012

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The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

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Teece Demonstratives

816a

EXHIBIT
D86

ALL-STATE LEGAL®

A02963

Summary of Primary Opinions

A. Plaintiffs' proposed relevant geographic market (the Philadelphia DMA) is incorrect and inappropriate for analyzing the impact of the challenged conduct

B. Plaintiffs' proposed geographic market is inconsistent with the analyses and theories of anticompetitive harm put forth by their experts

C. Plaintiffs have not shown any increase in Comcast's alleged market power in their proposed geographic market due to the challenged conduct:
   - Market power should be assessed at the local or household level

D. Plaintiffs have not shown common antitrust impact across their proposed Class and, under their own theories, cannot show common impact

E. Dr. McClave's damages method is untethered from Plaintiffs' liability claims

A02964

817a

Plaintiffs' Proposed Relevant Geographic Market is Incorrect

A. From a Merger Guidelines Perspective, the relevant market is the household
   - Consumers only choose from providers that can serve their household

B. For analytical convenience, one might aggregate into local areas comprised of households that face the same set of provider choices

C. The household is the geographic market definition recognized by the FCC

D. Plaintiffs' proposed relevant geographic market (which covers 18 counties and over 600 franchise areas) combines many different geographic markets with different local competitive conditions

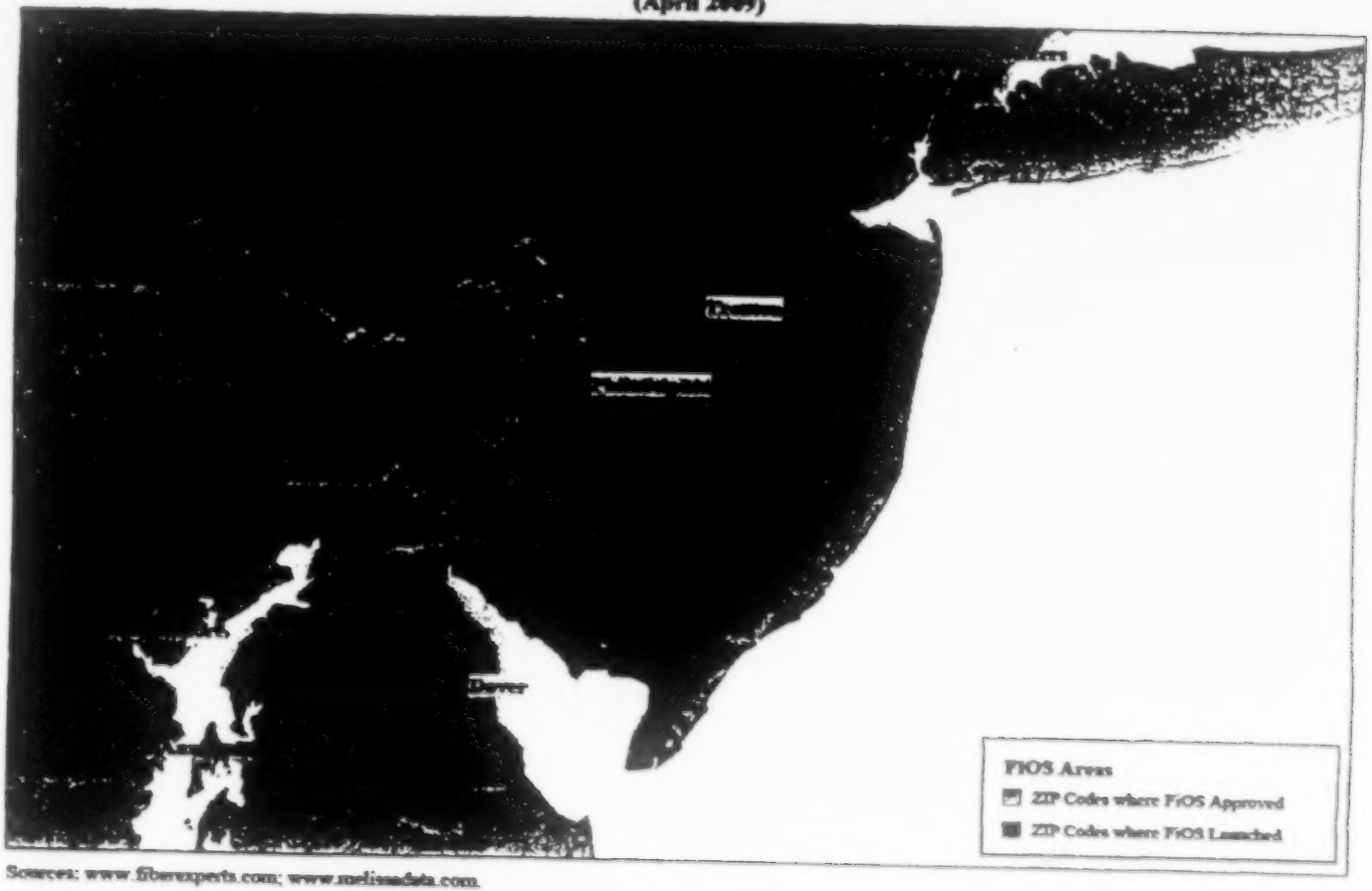
E. Plaintiffs' experts refer to competitive conditions in individual counties, individual franchise areas, and even smaller geographic units; for example:
   - Competition for <u>original</u> franchise rights
   - Alleged RCN Foreclosure

A02965

818a

Exhibit 1 to Teece Class Certification Report

Verizon FiOS in the Philadelphia DMA
(April 2009)

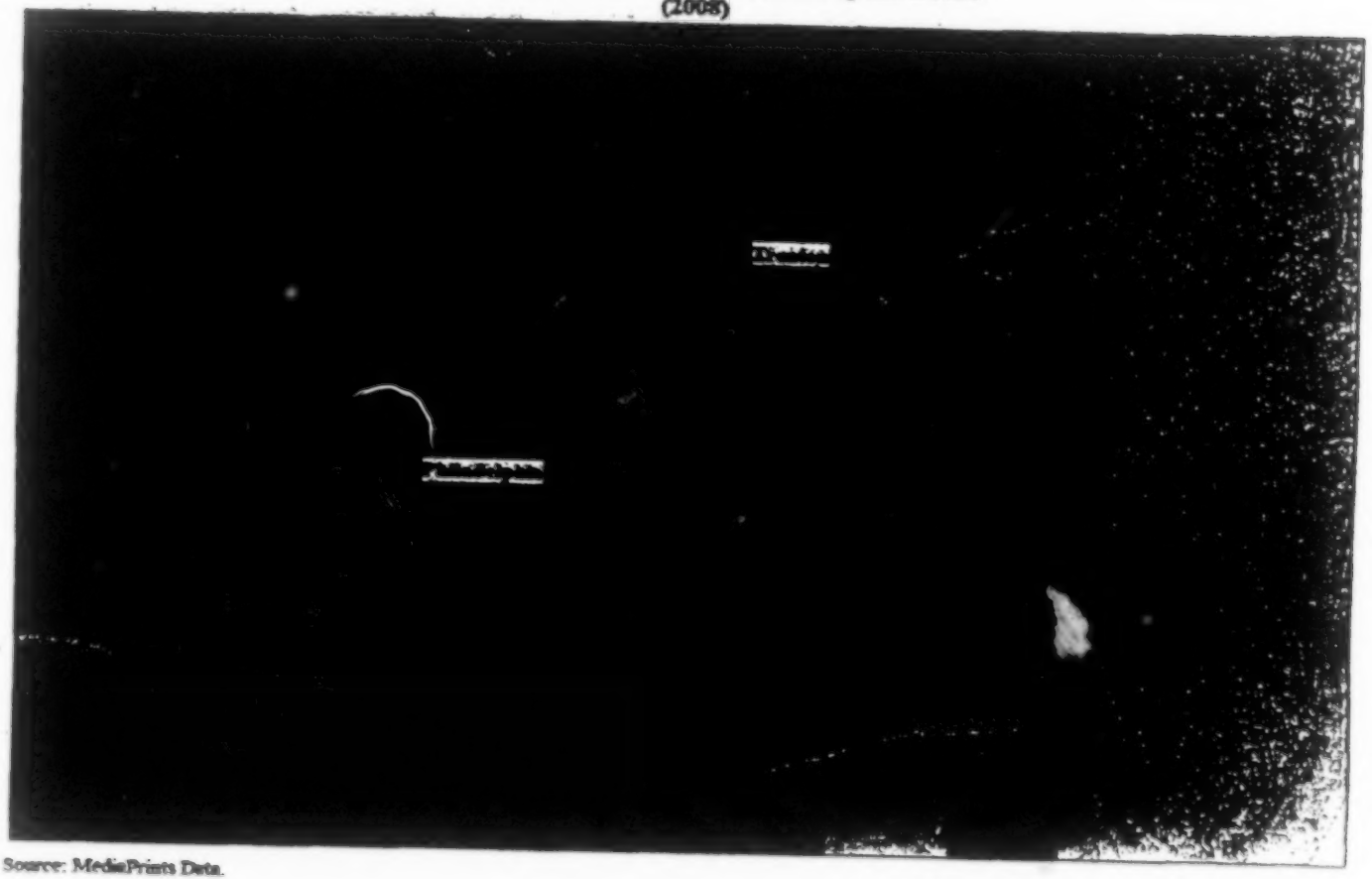


Sources: www.fiberexperts.com; www.melissadata.com

Slide 3

Exhibit 2 to Teece Class Certification Report

RCN Service Areas in the Philadelphia DMA
(2008)

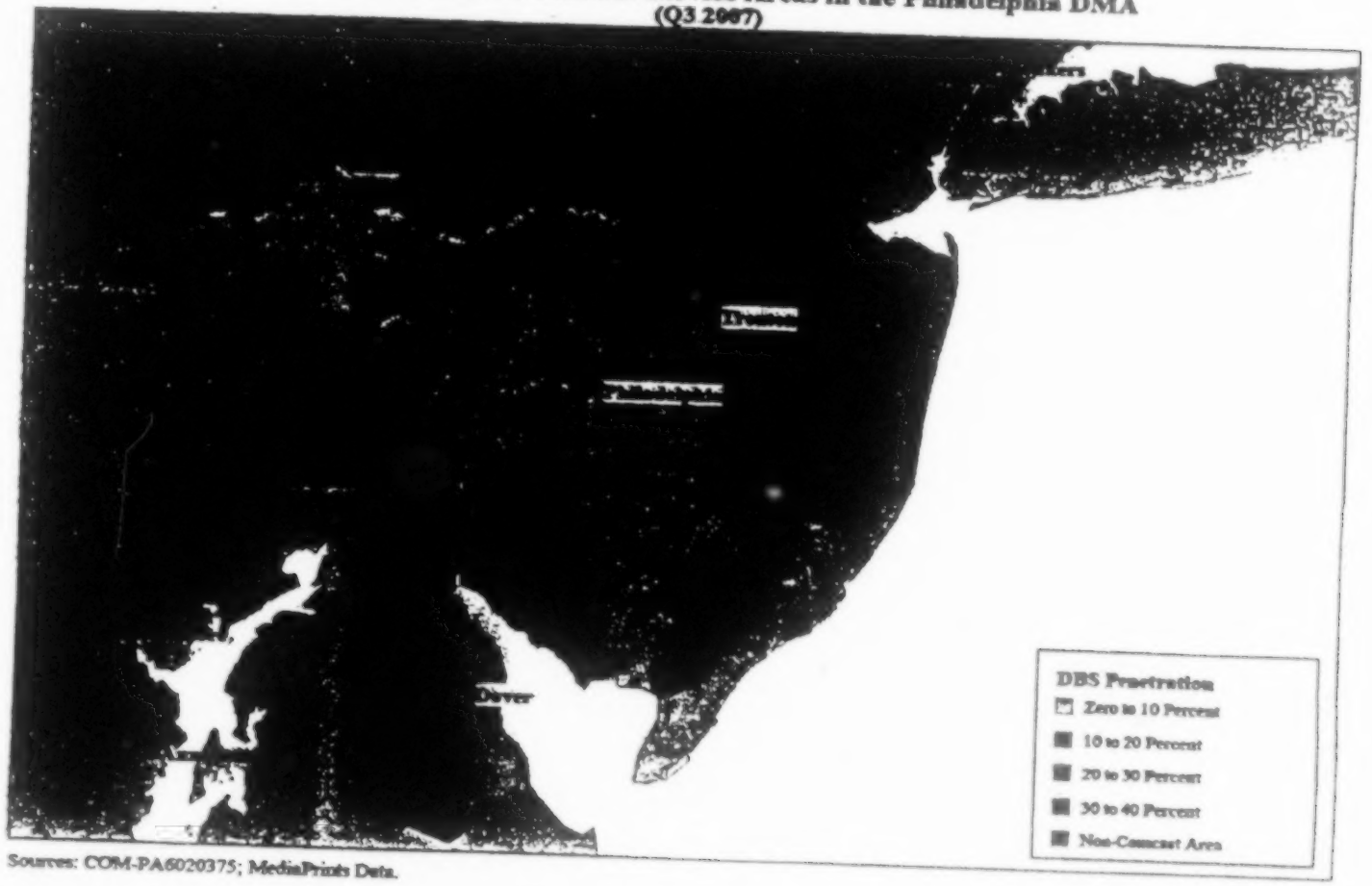


Source: MediaPrints Data.

Slide 4

Exhibit 3 to Teece Class Certification Report

DBS Penetration in Comcast Service Areas in the Philadelphia DMA
(Q3 2007)



Sources: COM-PA6020375; MediaPrints Data.

Slide 5

Overview of Plaintiffs' Theories of Impact From the Transactions

A. Alleged loss of potential competition from adjacent MSOs

B. Alleged loss of competition for <u>original</u> franchise rights

C. Alleged loss of competition for acquisitions of existing cable systems

D. Alleged loss of "benchmark" (or "yardstick") competition

E. Allegation that clustering deters cable overbuilders like RCN

F. Allegation that "clustering" leads to lower content prices and higher cable prices

A02969

822a

Alleged Loss of Potential Competition from Adjacent MSOs

A. Transaction counterparties were MSOs, not cable overbuilders

B. Fundamental economics of cable overbuilding by MSOs are bad

C. Adjacent MSOs didn't overbuild in the real world, and there is no evidence they would have absent the transactions; so adjacent MSOs are not potential competitors

D. No evidence Comcast took the prices of adjacent MSOs into account when setting prices

E. Dr. Williams' theoretical model on adjacent MSO overbuilding is unsupported by any empirical evidence and based on the flawed assumption that MSOs overbuild

F. Under Dr. Williams' theoretical model of adjacent MSO overbuilding, common impact is logically impossible

823a

A02970

Alleged Loss of Competition for Original Franchise Rights

A. No theoretical basis for harm to competition for subscribers from alleged reduction in competition for original franchise rights (different markets)

B. No empirical evidence of harm to competition for subscribers from alleged reduction in competition for original franchise rights

C. 98% of original cable franchises in the DMA were awarded before the class period, so most areas in DMA necessarily not impacted by any alleged harm

824a

A02971

Alleged Loss of Competition for Acquisition of Existing Cable Systems

A. Competition to purchase existing cable systems (i.e., the market for corporate control) is not relevant to competition to provide MVPD services to subscribers (different markets)

B. Even accepting the theory, there is no common impact because cable systems were acquired at different points in time in different parts of the DMA, so any impact would necessarily not be common across the class

825a

A02972

Alleged Loss of "Benchmark" (or "Yardstick") Competition

A. So-called "benchmark competition" is neither actual competition nor potential competition

B. "Benchmarking" is sometimes used by regulators, but regulated "basic" cable rates are not at issue in this case

C. No evidence cable subscribers in the Philadelphia DMA compare the price of their MVPD service to the prices of adjacent cable operators or that, even if they did so, it would have any impact on cable prices

D. Information about unavailable choices does not discipline competition

E. Any alleged impact must necessarily vary widely across the class and over time

826a

A02973

Alleged Deterrence of Overbuilding by Cable Overbuilders Like RCN

A. Dr. Williams' theoretical model of overbuilding by cable overbuilders like RCN is based on erroneous assumptions:
   - Erroneously assumes cable overbuilding is profitable
   - Erroneously assumes incumbents are monopolists

B. Fundamental economics of cable overbuilding are bad (both for MSOs and RCN)

C. "Fighting" in Dr. Williams' theoretical model could benefit consumers (e.g., price discounts), which would clearly be procompetitive

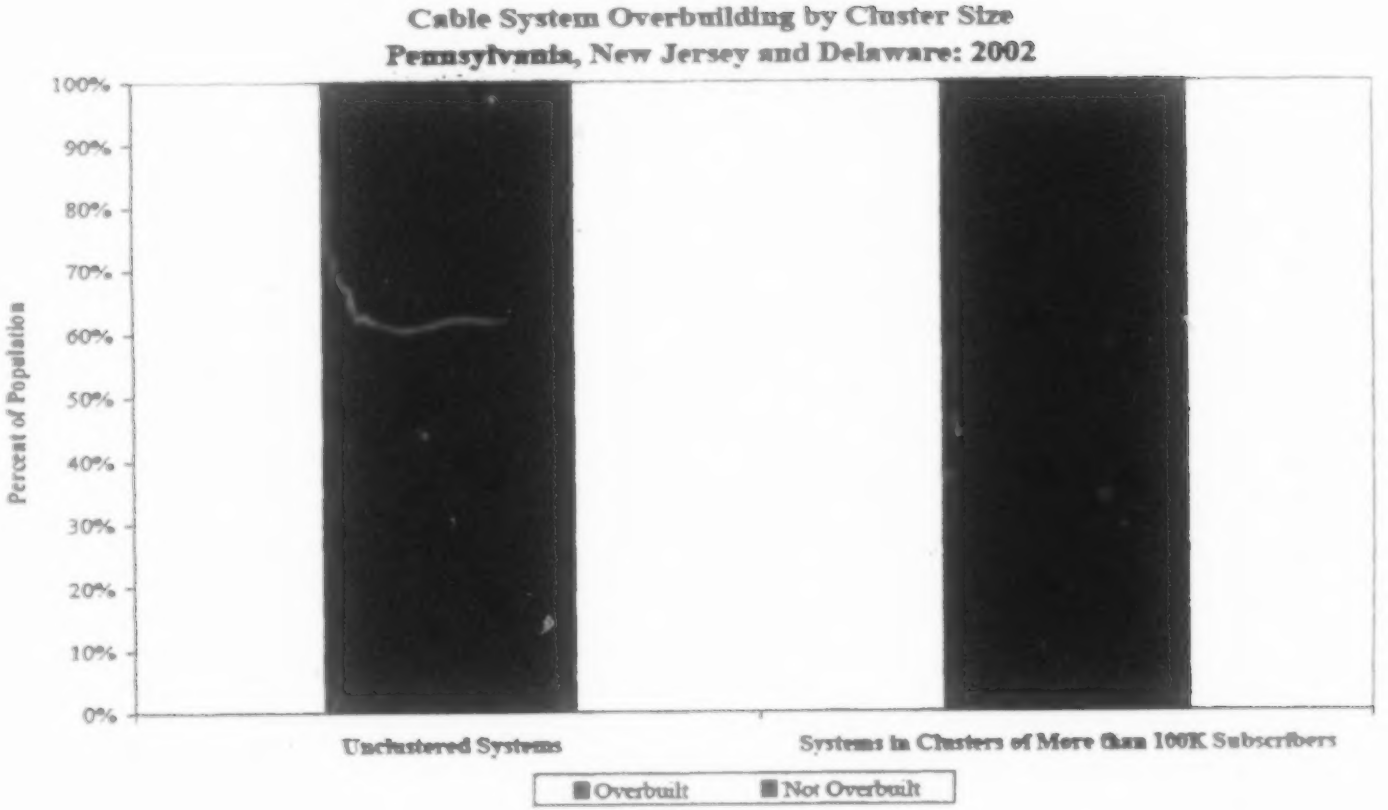
D. The available empirical evidence is inconsistent with Dr. Williams' theory

E. Any impact of alleged deterrence of overbuilding is necessarily confined to specific local areas

827a

A02974

Exhibit 15 to Teece Merits Report



Note: Cluster size measured by basic subscribers. Excludes clusters that do not have basic subscribers reported.
Sources: MediaPrints data; Census Bureau (1990, 2000).

Slide 12

Allegation that "Clustering" Leads to Lower Content Prices and Higher Cable Prices

A. No empirical evidence that Comcast's ability to obtain programming at lower costs would increase cable rates

B. The application of basic economic principles implies that lower content prices would lead, if anything, to lower subscriber prices

A02976

829a

RCN Impact Necessarily Limited to Where RCN Would Have Overbuilt

A. Even accepting Plaintiffs' theories, at most RCN would have overbuilt portions of 5 of 18 total counties in the DMA

B. RCN did not build out many areas where it had OVS certificates

C. RCN's 2001 10-K indicated its "expansion plans in certain existing markets [...] were also curtailed or delayed" due to capital constraints

D. RCN filed for bankruptcy in 2004

From FCC Seventh Annual Report

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 00-132
Competition in the Market for the Delivery	)	
of Video Programming	)	

SEVENTH ANNUAL REPORT

831a

Footnote 441

441 [redacted] **It will instead concentrate on building out and increasing penetration in existing systems.** RCN, *RCN Outlines 2001 Plans for Growing Its Local Broadband Business* (press release), Dec. 21, 2000.

A02978

Slide 15

Selection from 2001 RCN 10-K

As the economy changed and the capital available to our industry became limited, the Company revised its strategic and fundamental plans accordingly. During the second quarter of 2001, the Company shifted focus from beginning construction in new markets to additional construction activities in its existing markets to achieve higher growth with lower incremental capital spending. The expansion plans in certain existing markets over the next 18 to 24 months were also curtailed and delayed in some markets. In addition, the Company began its initiative to reduce costs and increase operational efficiencies, and realigned resources to focus on core opportunities and product offerings.

DBS Foreclosure Claim

A. Observed conduct reflects competition via product differentiation and dynamic (Schumpetrian) competition in the marketplace

B. DBS product differentiation through:
   - (1) their own exclusive content (e.g., NFL Sunday Ticket, NASCAR Hotpass)
   - (2) improved quality (e.g., HD)
   - (3) some regional sports content [Burke testimony]

C. Access to SportsNet is not "essential" for DBS providers to compete effectively, as evidenced by rapid increases in DBS penetration in region

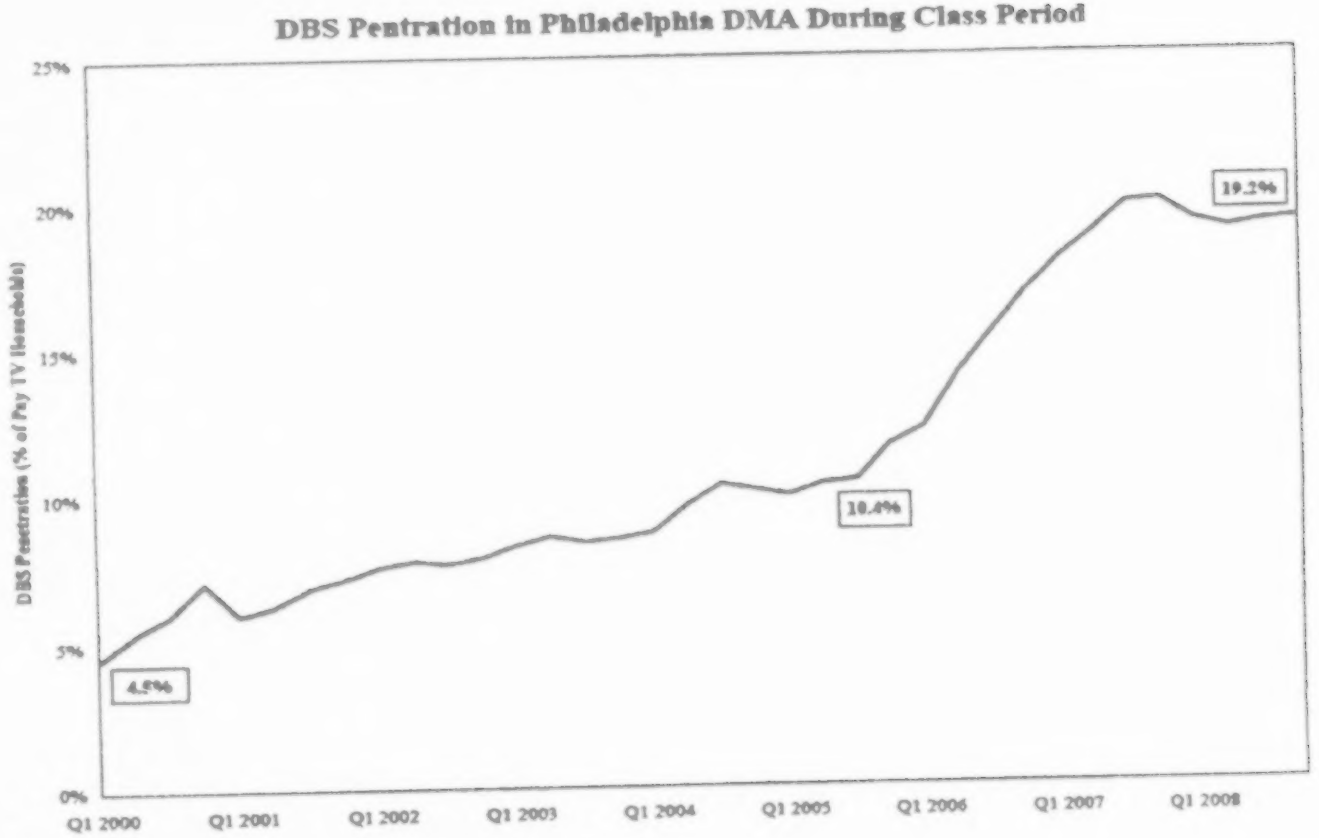
D. Lack of empirical evidence of causal link between DBS penetration levels and cable prices — It is not enough to claim that SportsNet is desired by DBS providers

E. Alleged impact of DBS foreclosure likely to vary widely across the DMA because consumer demand for SportsNet likely to vary widely

A02980

833a

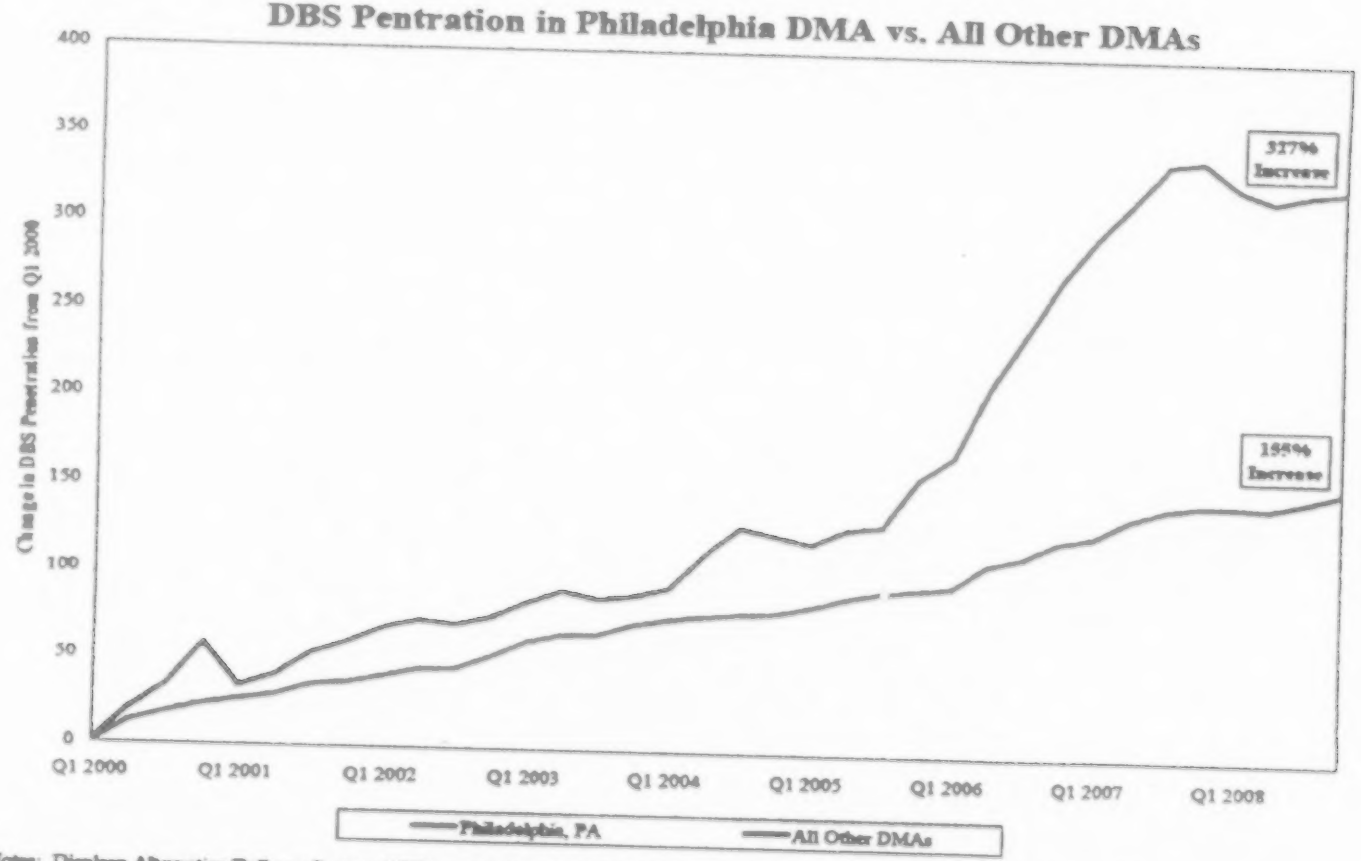
Exhibit 4 to Teece Class Certification Report



Note: Displays Alternative Delivery System (ADS) penetration.
Source: Nielsen Media Research as reported by TVB, 2000-2008.

Slide 18

Exhibit 5 to Teece Class Certification Report



Notes: Displays Alternative Delivery System (ADS) penetration. All Other DMA penetration based on 209 DMAs, weighted by 2008 television households.
Source: Nielsen Media Research as reported by TVB, 2000-2008.

Slide 19

Dr. McClave's Damages Method is Untethered from Plaintiffs' Liability Claims

A. Damages analysis must be derived from: (1) Plaintiffs' liability theory; and (2) an analysis of causation

B. Proper specification of the but-for world requires economic analysis of conduct and outcomes but-for the challenged conduct, which Dr. McClave did not do

C. Challenged conduct includes "clustering" and alleged DBS foreclosure; but Dr. McClave's "benchmarks" are not derived from an analysis of but-for competitive conditions:

- Dr. McClave simply assumes, without foundation, that 40% Comcast share is a meaningful and properly calibrated benchmark
- Dr. McClave's use of a national average "ADS" penetration level threshold is arbitrary and inconsistent with the Singer-Sidak results (which predicted 15.4% DBS penetration in Philadelphia vs. a national average of more than 20%)

D. Dr. McClave's county-level analysis:

- (1) is inconsistent with Dr. Williams' geographic market (the Philadelphia DMA)
- (2) fails to account for relevant differences across areas within counties

836a

A02983

$$\ln(\text{Price}) = 2.84$$
$$+ \underline{Yr(03)}\,(-.31) + \underline{Yr(04)}\,(-.24)$$
$$+ \underline{Yr(05)}\,(-.15) + \underline{Yr(06)}\,(-.09)$$
$$+ \underline{Yr(07)}\,(-.04)$$
$$+ \underline{\ln(\text{Median Income})} \times .07$$
$$+ \underline{\ln(\text{Channel Cap})} \times .06$$
$$+ \underline{\text{Overbuilt}} \times (-.10)$$

J.T.M.

100 Customers

90 pay list $50

10 pay 20% off $40

~~Dam~~ Overcharge from model 10%

90 at list: But-For = $45

10 at 20% Disc. B·F = $36

Damages = 90 × $5

+ 10 × $4

= 450 + 40 = $490

Disc Price = $40

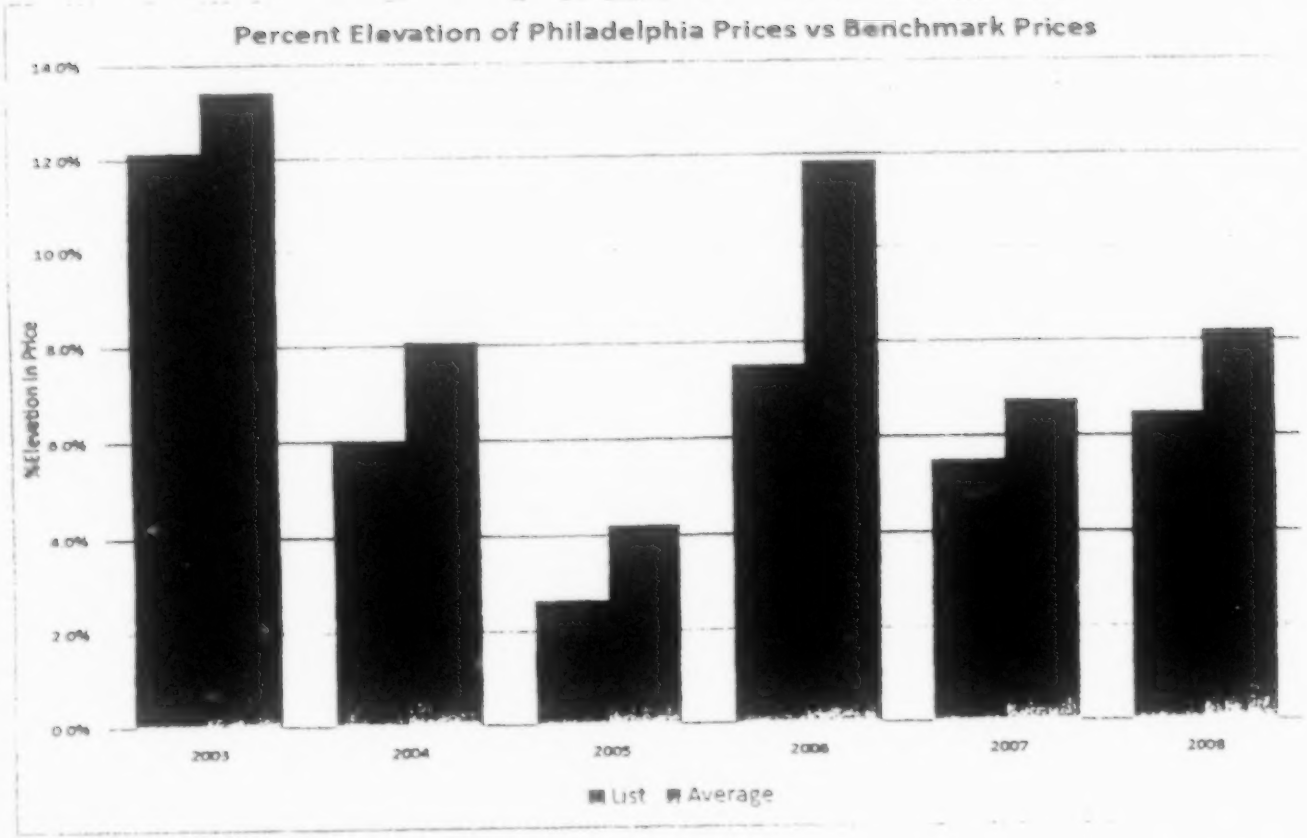
But For = $36

But For List = $45

20% off = $36

J.T.M.

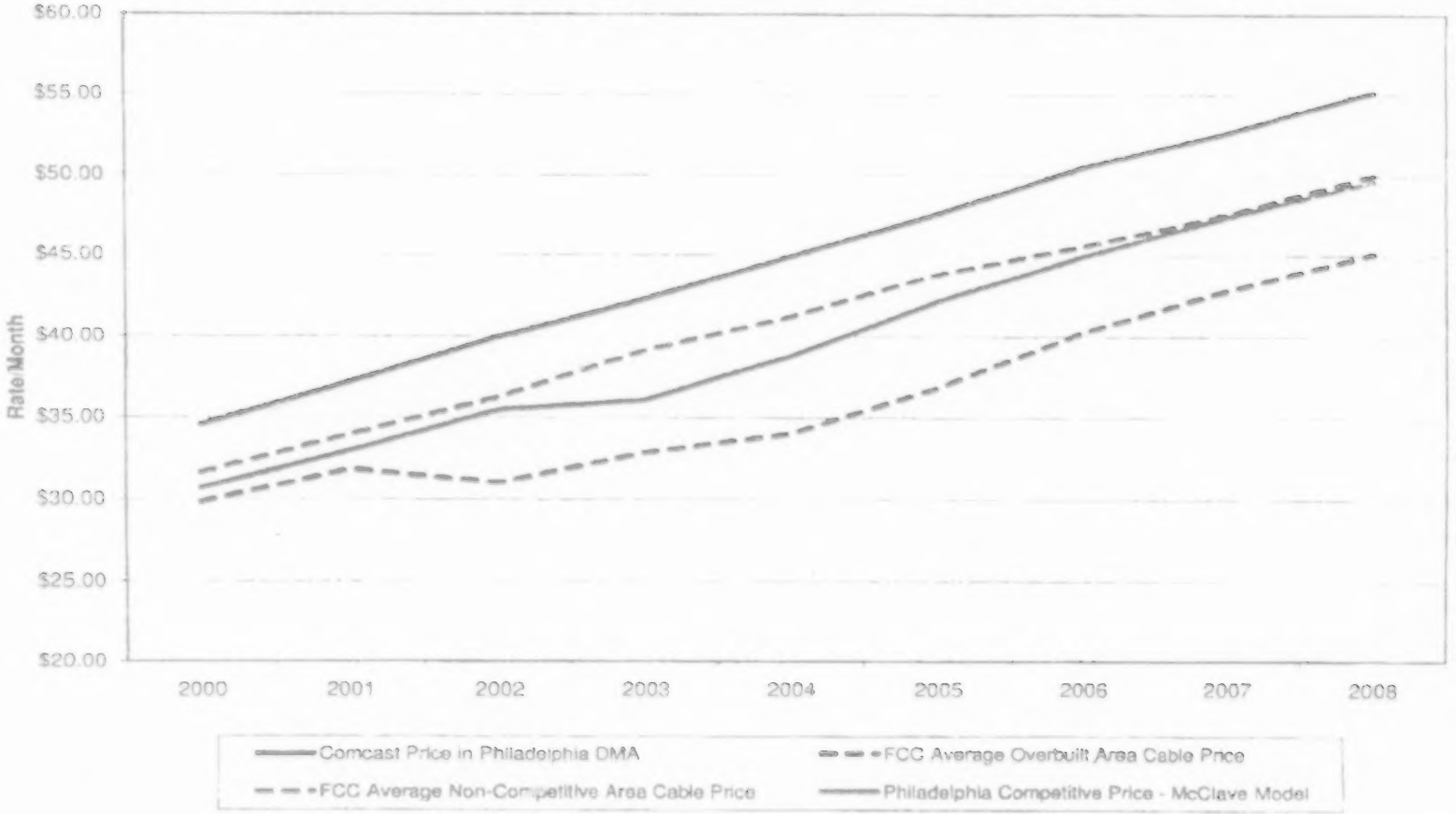
□



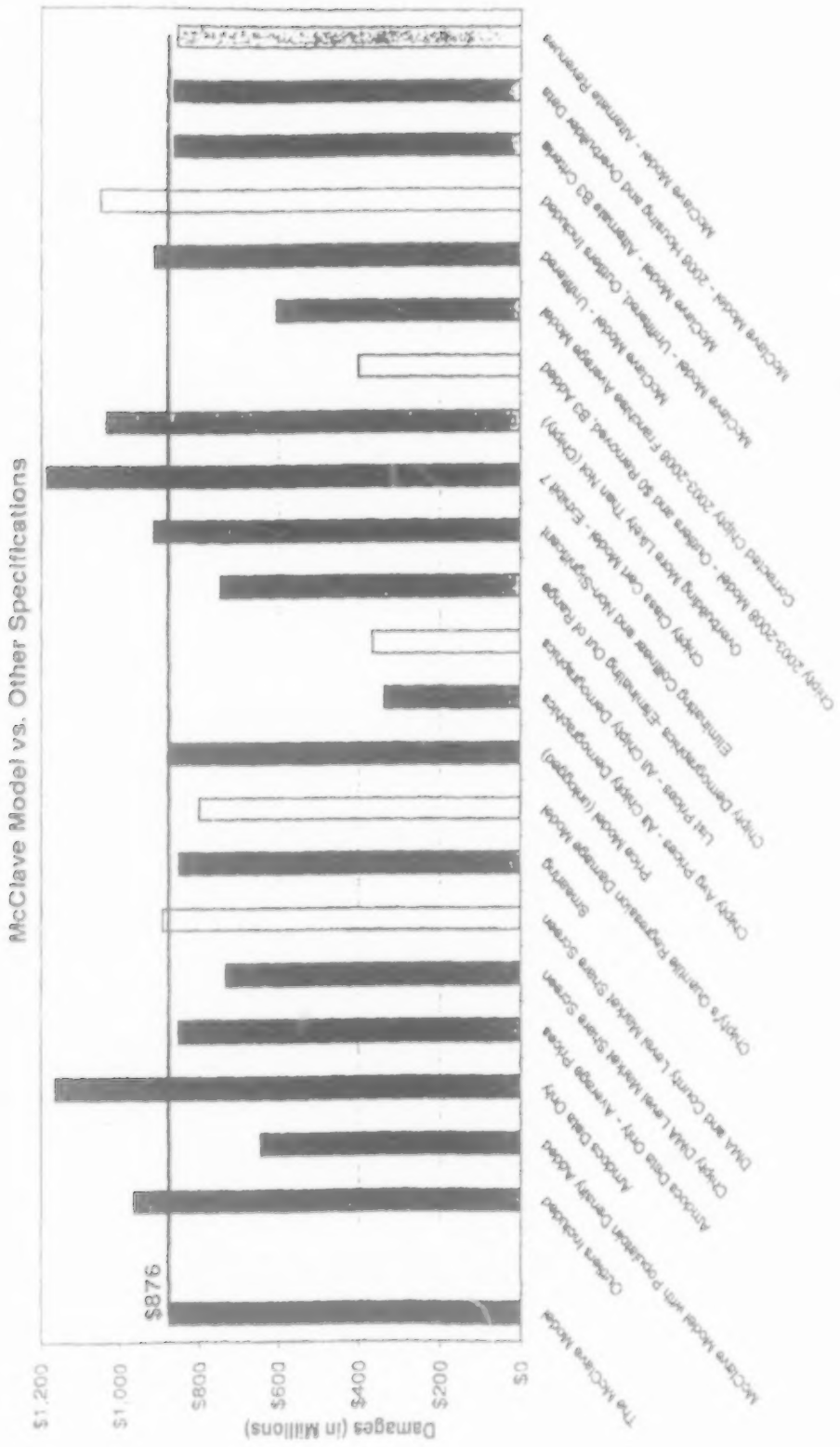
*Amdocs and CSG Data with Triple Play Prices and Zeros Excluded

Plaintiff
Exhibit
64

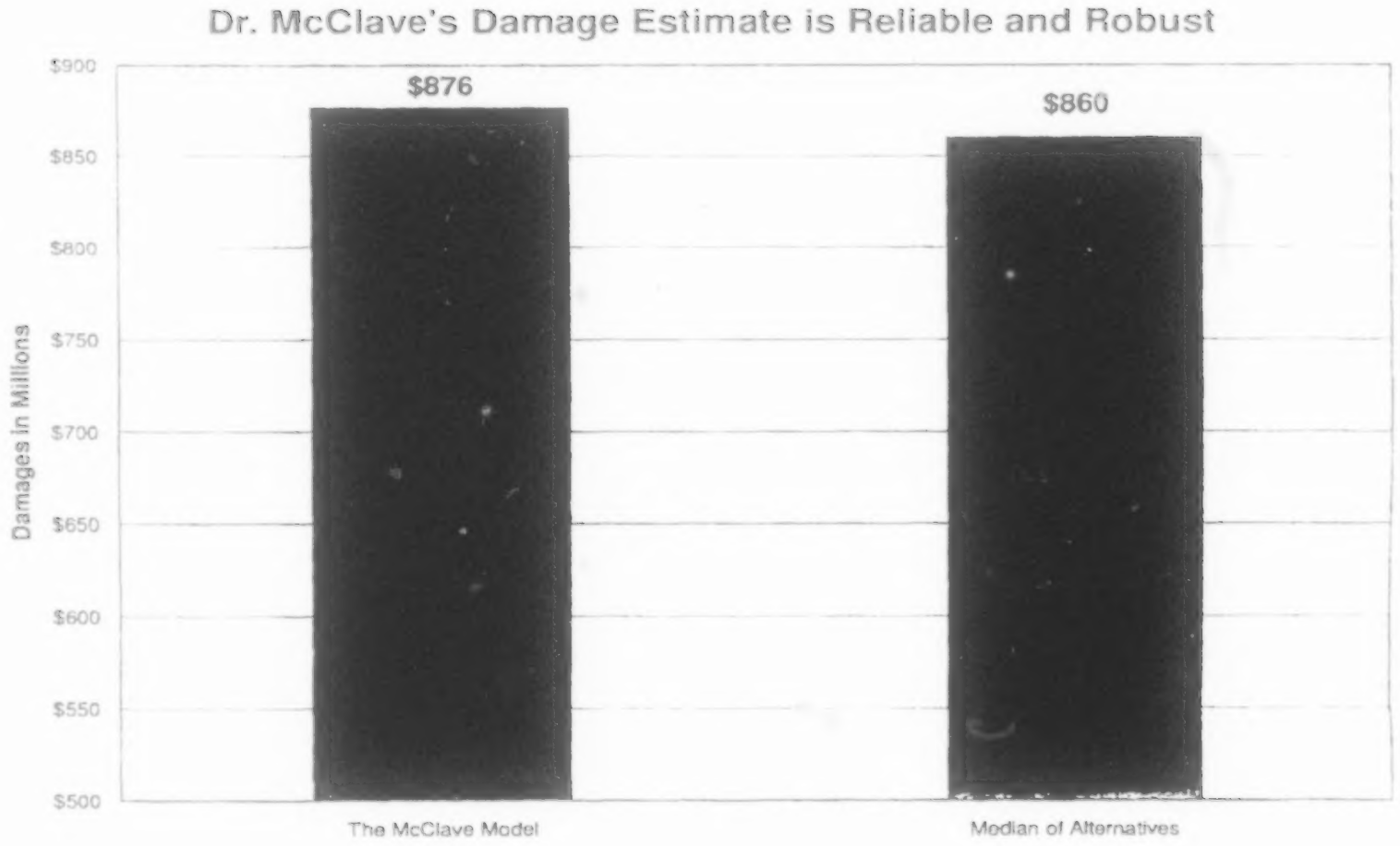
Comparison of Philadelphia Rates to FCC and But-For Rates



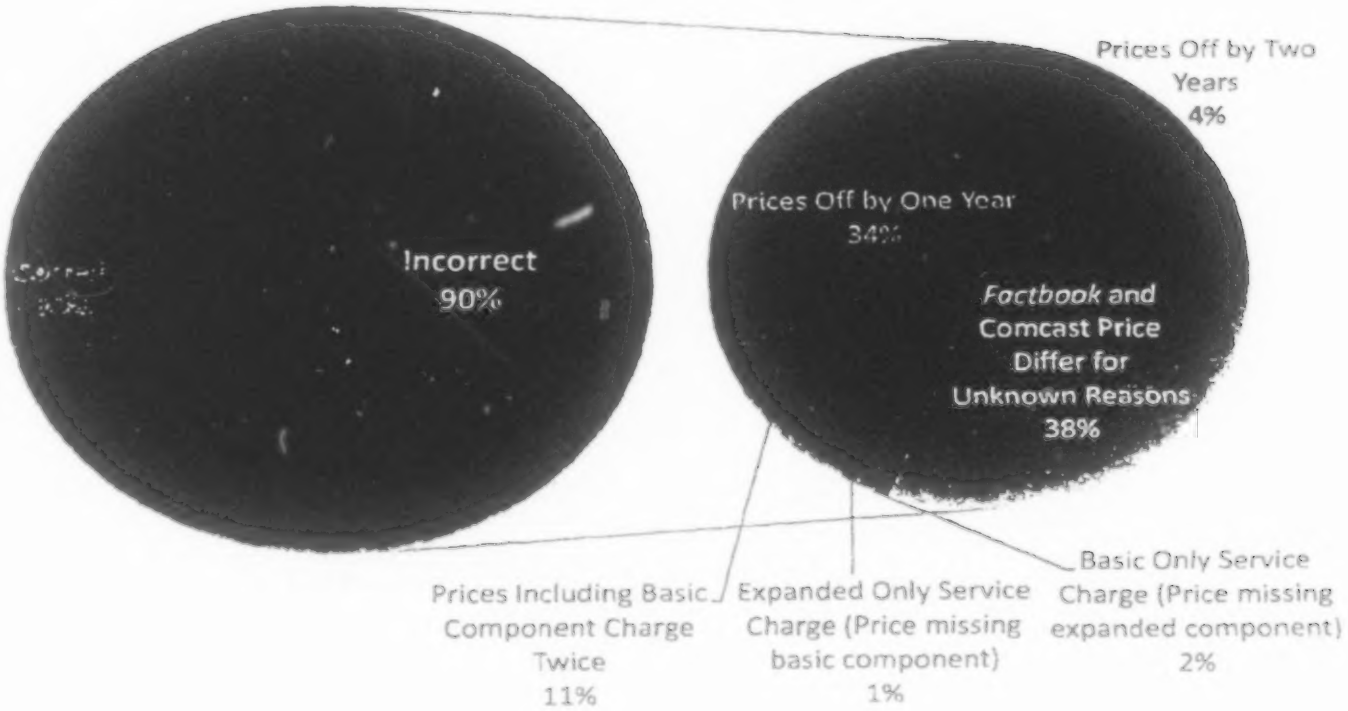
Source: Figure 1, May 4, 2009 McClave Declaration; based on Comcast billing system data and FCC Cable Price Reports


McClave Model vs. Other Specifications
Damages (in Millions)
$1,200
$1,000
$800
$600
$400
$200
$0
$876
The McClave Model
McClave Model with Population Density Added
Outliers Included
Amdocs Data Only
Amdocs Data Only - Average Prices
Chipty DMA Level Market Share Screen
DMA and County Level Market Share Screen
Chipty's Quantile Regression Damage Model
Smearing
Price Model (unlogged)
Chipty Avg Prices - All Chipty Demographics
List Prices - All Chipty Demographics
Chipty Demographics -Eliminating Out of Range
Eliminating Collinear and Non-Significant
Chipty Class Cert Model - Exhibit 7
Overbuilding More Likely Than Not (Chipty)
Chipty 2003-2008 Model - Outliers and $0 Removed, B3 Added
Corrected Chipty 2003-2008 Franchise Average Model
McClave Model - Unfiltered
McClave Model - Unfiltered, Outliers Included
McClave Model - Attenuate B3 Criteria
McClave Model - 2008 Housing and Overbuilder Data
McClave Model - Attenuate Revenues

A03082

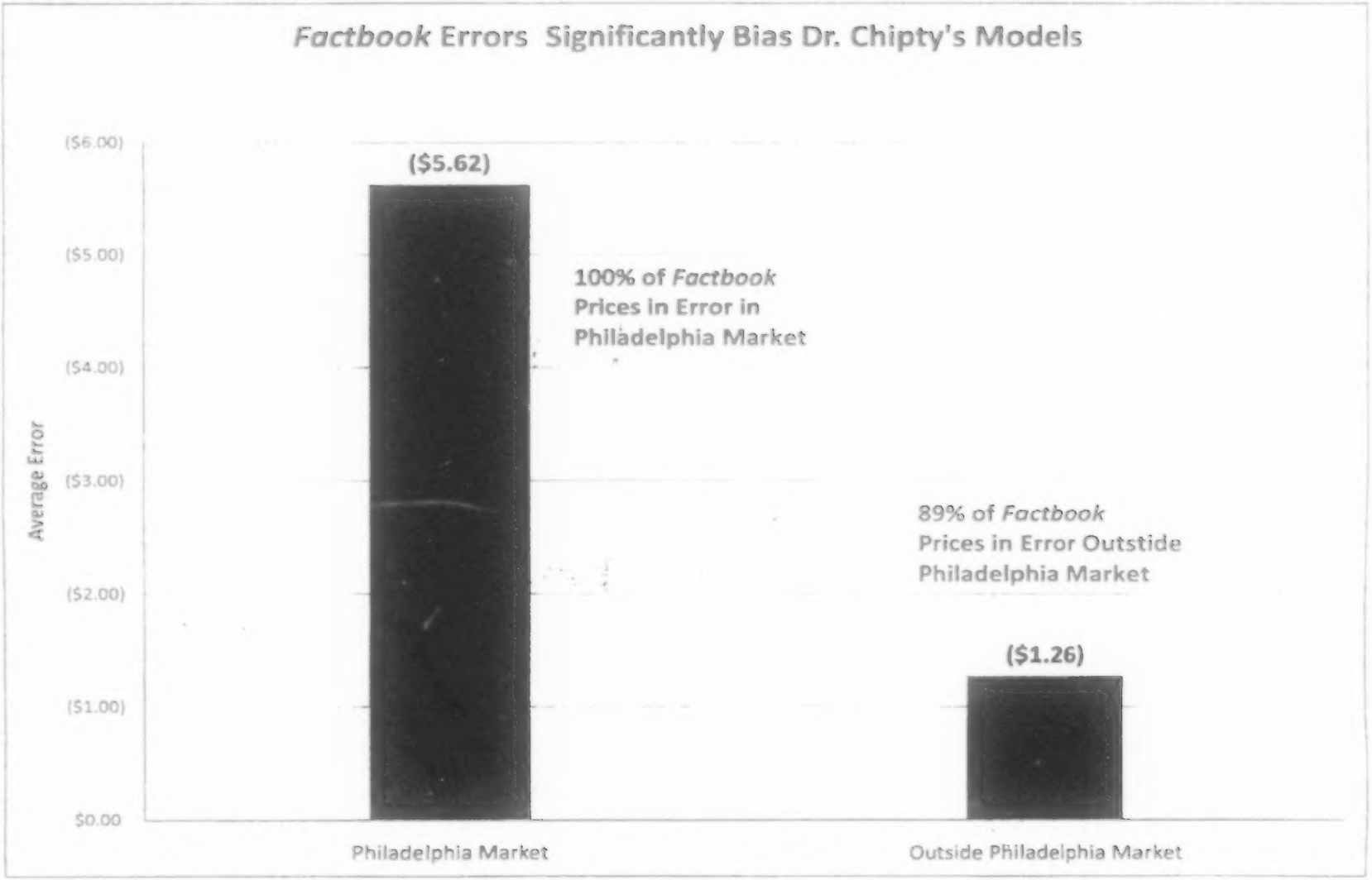

Dr. McClave's Damage Estimate is Reliable and Robust
$900
$850
$800
$750
$700
$650
$600
$550
$500
Damages in Millions
$876
$860
The McClave Model
Median of Alternatives

Dr. Chipty's *Factbook* Data Errors

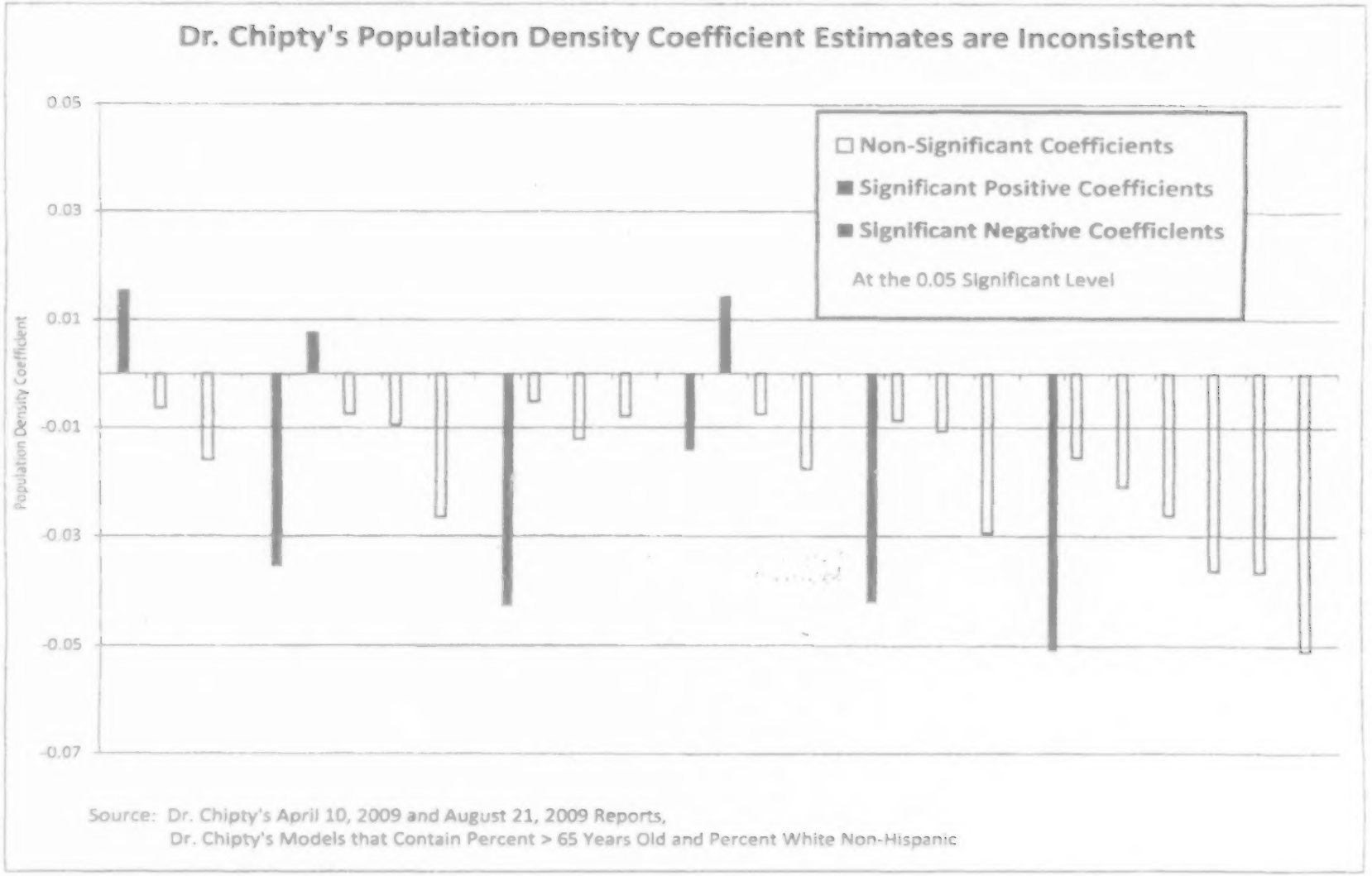


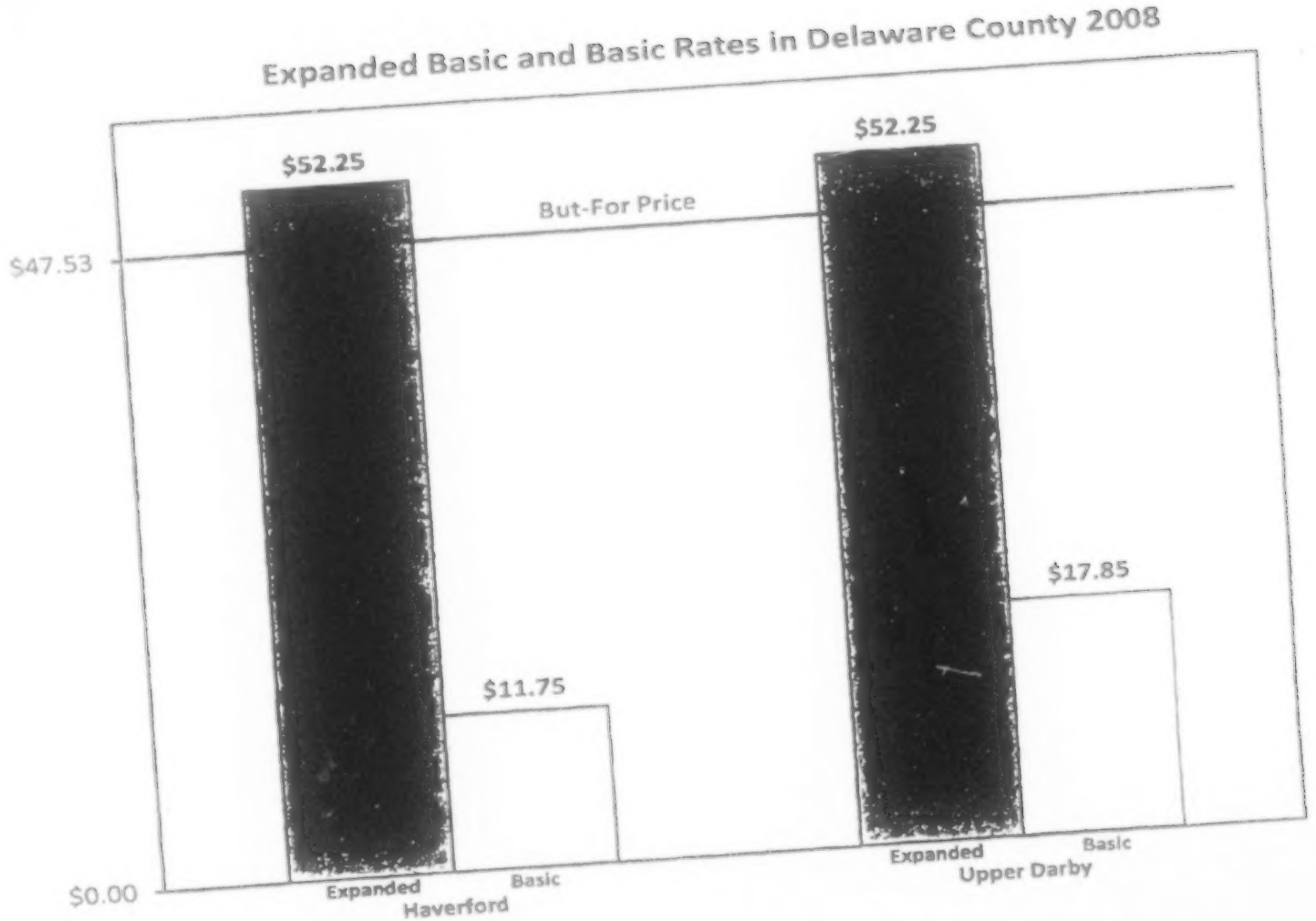
Percents are based on the 289 *Factbook* prices used by Dr. Chipty for principal communities that were matched against Comcast's billing records.

Source: McClave May 11, 2009 Rebuttal Declaration



Source: McClave September 11, 2009 Supplemental Declaration

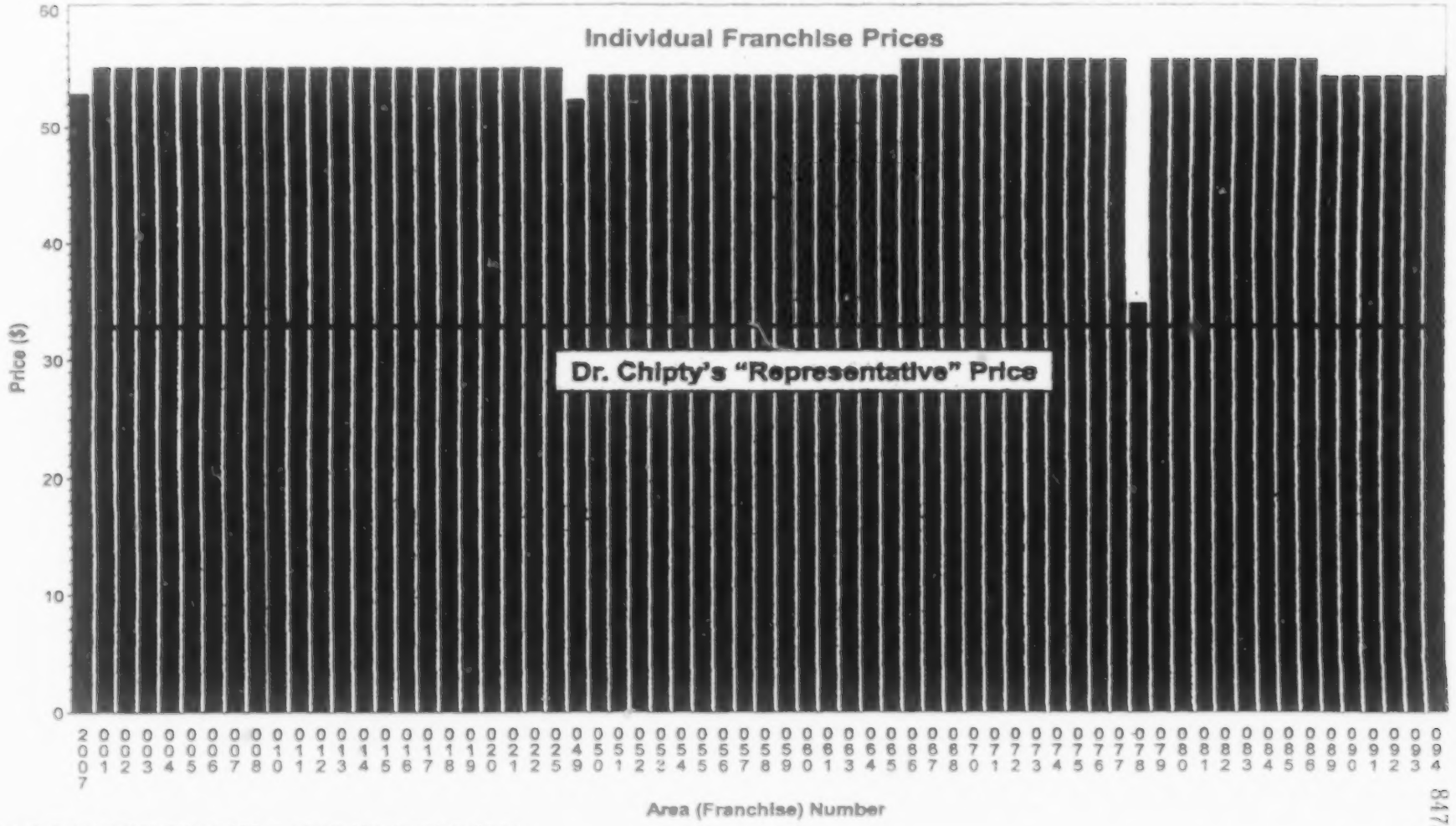

Dr. Chipty's Population Density Coefficient Estimates are Inconsistent
0.05
0.03
0.01
-0.01
-0.03
-0.05
-0.07
Population Density Coefficient
Non-Significant Coefficients
Significant Positive Coefficients
Significant Negative Coefficients
At the 0.05 Significant Level
Source: Dr. Chipty's April 10, 2009 and August 21, 2009 Reports,
Dr. Chipty's Models that Contain Percent > 65 Years Old and Percent White Non-Hispanic



Source: McClave September 11, 2009 Supplemental Declaration

Dr. Chipty's Price Is Not Representative

Southern New Jersey - July 2008

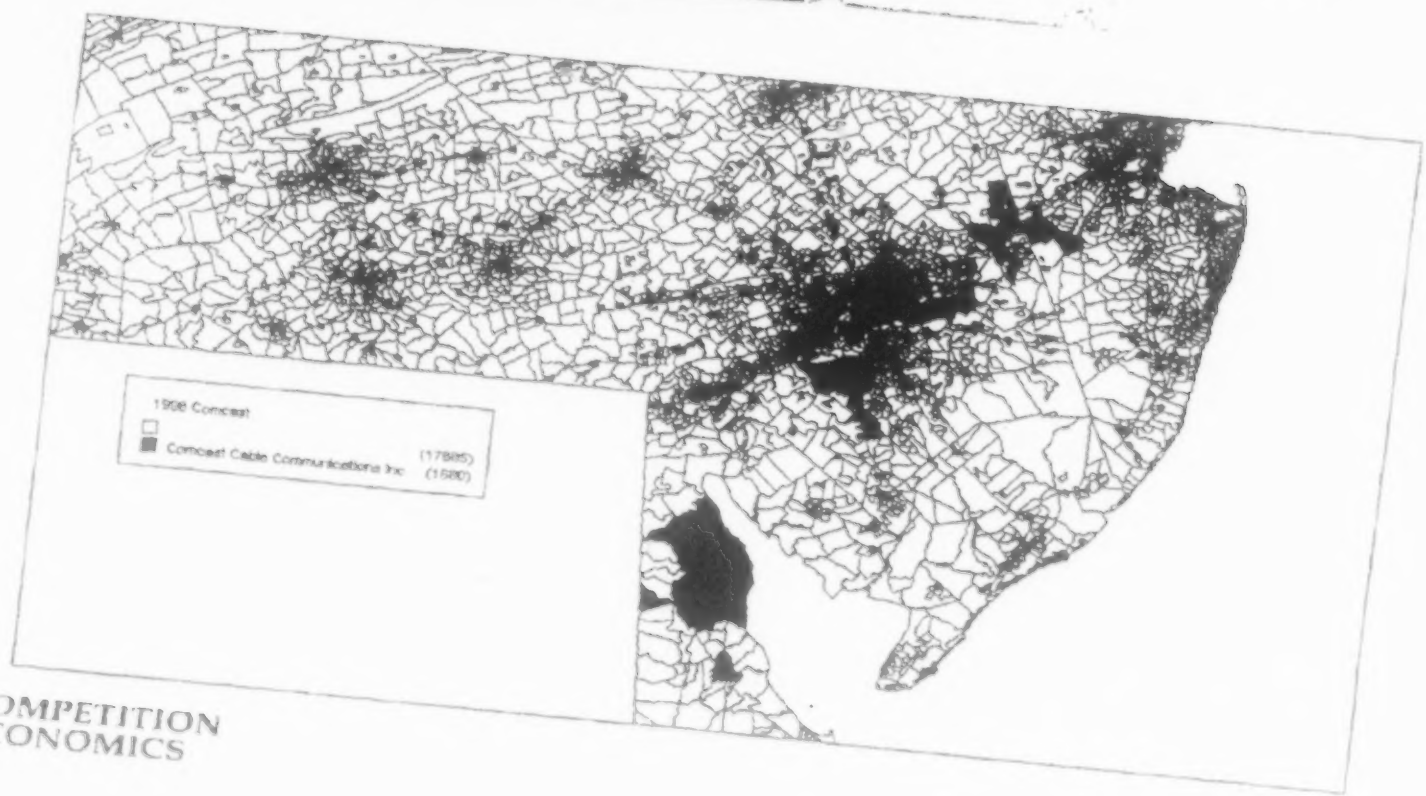


Franchises with greater than 100 expanded basic subscribers
Source: Comcast AmDocs billing system data

847a

A03088

... IN PHILADELPHIA DMA - 1998

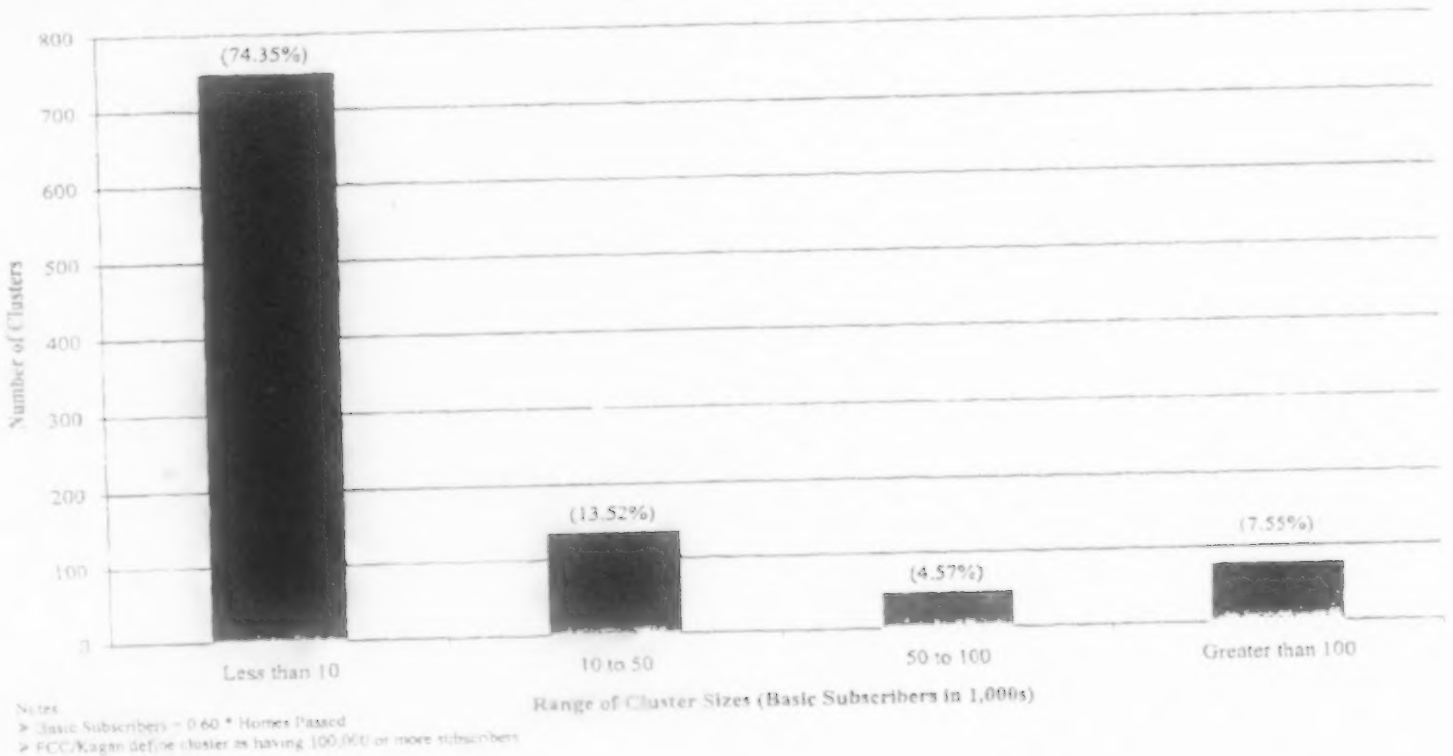


COMPETITION
ECONOMICS

PHILADELPHIA DMA - 2007

COMPETITION
ECONOMICS

Claimed Cluster Sizes



Notes:
- Basic Subscribers = 0.60 * Homes Passed
- FCC/Kagan define cluster as having 100,000 or more subscribers

COMPETITION ECONOMICS

A03092

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 17 2012
OFFICE OF THE CLERK

No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,

Petitioners,

v.

CAROLINE BEHREND, ET AL.,

Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit**

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the following are parties to this proceeding:

Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC are petitioners in this Court and were defendants-appellants below.

Stanford Glaberson, Joan Evanchuk-Kind, and Eric Brislawn are respondents in this Court and were plaintiffs-appellees below.

Andrew Behrend, Caroline Cutler, Marc Dambrosio, Michael Kellman, Lawrence Rudman, Kenneth Saffren, Marc Weinberg, and Barbi J. Weinberg were plaintiffs in the district court.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONERS

Petitioners Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully submit that the judgment of the court of appeals should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-88a) is reported at 655 F.3d 182. The opinion of the district court (Pet. App. 89a-188a) is reported at 264 F.R.D. 150; an amended order (Pet. App. 189a-194a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. A timely petition for rehearing was denied on September 20, 2011. *See* Pet. App. 195a-196a. Justice Alito extended the time in which to file a petition for a writ of certiorari to and including January 18, 2012. *See* No. 11A534. The petition was filed on January 11, 2012 and granted on June 25, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

> respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The Rules Enabling Act, 28 U.S.C. § 2072, provides in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . .
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right.

Federal Rule of Civil Procedure 23(b) provides in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Rule 23 is reproduced in its entirety in the appendix to this brief, *infra*, 1a-8a.

STATEMENT

In this antitrust action, Plaintiffs sought certification of a class that includes more than two million current and former cable television subscribers in the Philadelphia area. Over Comcast's objections, the district court certified the class, and the Third Circuit affirmed the certification order on interlocutory review.

1. Comcast is a media, entertainment, and communications company and a provider of cable services to residential and business customers; Plaintiffs purport to represent a class of more than two million present and former Comcast cable television subscribers in the Philadelphia area. Pet. App. 6a; *see also* J.A. 35a ¶ 32. Claiming that they paid too much for cable, Plaintiffs brought suit in the Eastern District of Pennsylvania. Pet. App. 5a, 7a. They allege that Comcast monopolized Philadelphia's cable market and excluded competition in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. Pet. App. 5a.[1]

According to Plaintiffs, Comcast engaged in "anticompetitive 'clustering.'" Pet. App. 6a. "'Clustering' refers to a 'strategy whereby cable [operators] concentrate their operations in regional geographic areas by acquiring cable systems in regions where the [operator] already has a significant presence, while giving up other holdings scattered across the country.'" *Ibid.* (quoting *In re Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd. 17791, 17809 & n.134 (2007)). As the FCC has acknowledged, clustering is a common practice in the cable industry that can provide various pro-competitive benefits for the markets at issue. *See In re Adelphia Commc'ns Corp.*, 21 FCC Rcd. 8203, 8318 (2006).

Clustering is accomplished "through purchases and sales of cable systems, or by system 'swapping' among [operators]." Pet. App. 7a (quoting 22 FCC

---

[1] Similar claims regarding the Chicago and Boston cable markets have been stayed pending resolution of the Philadelphia claims. *See* Pet. App. 8a & n.5.

Rcd. at 17809 n.134) (internal quotation marks omitted). Comcast is alleged to have engaged in both acquisitions and swaps, through which it eventually controlled a 69.5% share of subscribers in the Philadelphia Designated Marketing Area ("DMA"), which includes the city of Philadelphia and surrounding counties. *Id.* at 3a-6a & nn.2, 4.[2]

Although the transactions at issue were vetted and approved by the Federal Communications Commission and federal antitrust authorities, Plaintiffs claim that those transactions were designed to "eliminat[e] competition, rais[e] entry barriers to potential competition, maintai[n] increased prices for cable services at supra-competitive levels, and depriv[e] subscribers of the lower prices that would result from effective competition." Pet. App. 7a. To prevail on their claims, Plaintiffs are required to prove "(1) a violation of the antitrust laws (here, sections 1 and 2

---

[2] A DMA is a "specific media research area that is used by Nielsen Media Research to identify television stations whose *broadcast* signals reach a specific area and attract the most viewers," which in turn is "used by all types of companies to target and keep track of advertising." Pet. App. 3a n.1 (quoting *Steak n Shake Co.* v. *Burger King Corp.*, 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004)) (internal quotation marks omitted; emphasis added). Although Plaintiffs contend that the relevant geographic market is the Philadelphia DMA, *see* Pet. App. 16a, the class definition is limited to Comcast's "Philadelphia cluster," which includes only counties that Plaintiffs allege to be "covered by Comcast's cable franchises or any of its subsidiaries or affiliates," J.A. 34a ¶ 34(a)(2), and thus excludes the "two counties in which Comcast has no presence," Pet. App. 57a n.9 (Jordan, J., dissenting in relevant part). Because these counties "would be excluded from the class regardless of its geographic scope," *ibid.*, and consistent with the approach typically used by the parties and courts below, this brief will refer to the Philadelphia DMA. *See, e.g.*, Pet. App. 35a; J.A. 1377a, 1388a.

of the Sherman Act), (2) individual injury resulting from that violation [*i.e.*, so-called 'antitrust impact'], and (3) measurable damages." *Id.* at 15a.

Plaintiffs initially advanced four theories of antitrust impact—and thus four mechanisms by which Comcast's conduct supposedly caused them damages. The district court, however, rejected three of those theories in ruling on the motion for class certification. Pet. App. 122a, 153a, 161a-162a. The sole remaining theory is that Comcast's clustering deterred competition from so-called "overbuilders." *Id.* at 24a-25a. Overbuilders are companies (other than satellite operators) that offer a "competitive alternative where a telecommunications company already operates." *Id.* at 7a. Plaintiffs maintain that, in the absence of clustering, overbuilders would have extended their telecommunications services into areas serviced by Comcast. *Ibid.* Based on the district court's rulings, "[p]roof of antitrust impact . . . shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." *Id.* at 192a-193a.

The parties disputed below whether, or to what extent, Comcast's allegedly anticompetitive clustering deterred overbuilding in the Philadelphia DMA. Only 1.3% of cable customers nationwide are served by an overbuilder. *See* J.A. 40a ¶ 44, 867a & n.31. And Comcast contended that there was no evidence of actual or potential overbuilding in the majority of counties. Pet. App. 25a-26a. Indeed, Comcast noted, the only alleged overbuilder—RCN Telecom Services—had FCC approval to overbuild in only five of the eighteen counties in the Philadelphia DMA. *Id.* at 61a-62a & n.16, 82a-83a (Jordan, J., dissenting in

relevant part); *see also* J.A. 1382a. Although, consistent with that fact, Plaintiffs' expert damages model assumed an "overbuilding factor" in only five counties, *id.* at 1387a-1388a, Plaintiffs nonetheless theorized that the deterrence of overbuilding caused elevated prices throughout the Philadelphia DMA, *see, e.g.*, Pet. App. 47a n.15.

The parties debated equally sharply whether, even if alleged deterrence of overbuilding had elevated prices beyond the five counties, the elevation would have been similar throughout the Philadelphia DMA. Comcast argued, for example, that differences among the approximately 650 franchise areas in the Philadelphia DMA made it impossible to determine even county-wide conditions, let alone class-wide conditions, that would have prevailed in the absence of the challenged conduct. *See* Pet. App. 82a-83a (Jordan, J., dissenting in relevant part). Particularly given the wide variation in Comcast's market shares in these franchise areas, Comcast emphasized, Plaintiffs could not assume that the but-for market conditions were uniform across the entire DMA.

2. Because Plaintiffs would be required at trial to prove damages as an element of their claims, Plaintiffs attempted to satisfy Rule 23(b)(3)'s predominance requirement by introducing an expert witness who proposed to calculate damages on a class-wide basis. Their damages expert—James McClave—opined that damages could be established on a class-wide basis by comparing actual cable prices to hypothetical prices that would have prevailed but for Comcast's challenged conduct. J.A. 1377a-1379a; *see also* Pet. App. 35a.

a. Dr. McClave constructed "but-for" prices to compare with Comcast's actual prices in the Philadelphia DMA during the relevant time period by identifying supposedly comparable "benchmark" counties around the country. J.A. 1377a; *see also* Pet. App. 35a-36. He used two data "screens" to select these counties:

- The first screen—"DBS Penetration"—removed counties where the penetration rate (*i.e.*, market share) for direct broadcast satellite ("DBS") and certain other alternatives to cable was lower than the average penetration rate for such providers across all DMAs where Comcast operates. J.A. 1380a-1381a; *see also* Pet. App. 36a. This screen was warranted, he opined, based on Plaintiffs' theory—later rejected by the district court—that the below-average DBS penetration rate in the Philadelphia DMA was the result of Comcast's clustering conduct. *See* J.A. 1380a; *see also* Pet. App. 74a-75a (Jordan, J., dissenting in relevant part).
- The second—"Market Share"—screen eliminated from the "benchmark" sample all counties where Comcast's market share equaled or exceeded 40%. J.A. 1379a-1380a; *see also* Pet. App. 36a. Dr. McClave selected this percentage because it was the "approximate midpoint" of Comcast's estimated 20% share of the Philadelphia DMA in 1998, before the alleged clustering had occurred, and its estimated 60% share from 2003 through 2008. J.A. 1380a; *see also* Pet. App. 77a (Jordan, J., dissenting in relevant part).

Having selected the "benchmark" group of counties, Dr. McClave performed a regression analysis comparing actual prices in the Philadelphia DMA's

counties to estimated "but-for" prices based on data from the "benchmark" counties. J.A. 1382a-1383a, 1394a-1396a tbl. A.2; *see also* Pet. App. 36a-37a. Based on this analysis, he concluded—"conservative[ly]"—that Comcast had overcharged subscribers approximately $875 million across the entire Philadelphia DMA during the class period. J.A. 1387a-1388a; *see also* Pet. App. 37a.

Dr. McClave's "model indicates that the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination," and thus his damages model results in purported damages for each of the sixteen counties in which Comcast operated in the Philadelphia DMA. J.A. 1382a. He acknowledged, however, that "[i]n this comparison I have assumed that only the five counties that RCN indicated that it planned to enter as an overbuilder would have been overbuilt." *Ibid.*; *see also* J.A. 1389a ("assuming that only five counties in the Philadelphia DMA would have had overbuilding").

b. Drawing on the testimony and expert reports of its own experts—David Teece and Tasneem Chipty—Comcast presented a number of challenges to Plaintiffs' damages model.

At the outset, Comcast noted that Dr. McClave's model had been prepared when Plaintiffs were advancing multiple theories of antitrust impact. Pet. App. 186a. Once most of Plaintiffs' theories were rejected by the district court, however, Comcast emphasized that the model could not be used to establish class-wide damages because (as Dr. McClave conceded) it did not provide a basis for segregating damages attributable solely to the remaining, accepted theory. *Id.* at 40a; *see also* J.A. 189a-190a. In this respect, Comcast argued, Dr. McClave's damag-

es model impermissibly identifies "damages" that "are not the certain result of the wrong." Pet. App. 45a (internal quotation marks omitted).

Comcast also raised several challenges to the screens used by Dr. McClave. The DBS Penetration screen was invalid, Comcast argued, because it assumed that the penetration rate in the Philadelphia DMA should have matched the national average in the absence of Comcast's conduct, even though (in rejecting one theory of antitrust impact) the district court expressly determined that Plaintiffs had failed to link "Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration rates." Pet. App. 120a; *see also id.* at 37a. And the Market Share screen was inappropriate for several reasons, including because Dr. McClave's 40% DMA-wide estimate was based on averaging Comcast's market share in the franchise areas where it operated with a "zero percent share" in those where it was not present. Pet. App. 79a-80a & n.27 (Jordan, J., dissenting in relevant part); *see also* J.A. 206a-207a, 1063a.

Finally, Comcast disputed the model's factual assumption that uniform "but-for" conditions would have existed throughout the Philadelphia DMA. The Philadelphia DMA encompasses 649 unique cable "franchises," each with its own prices, and the competitive conditions affecting those prices vary substantially across the DMA. *See, e.g.*, J.A. 1083a-1087a; *see also* Pet. App. 82a (Jordan, J., dissenting in relevant part). For this reason, Comcast maintained, not only was Dr. McClave's approach impermissible, but also calculating *any* "but-for" conditions for the *entire* DMA is impossible. *Id.* at 85a-86a nn.34 & 35, 88a.

c. The district court certified the class under Rule 23(b)(3). Acknowledging that Dr. McClave's model had been prepared when Plaintiffs were advancing multiple theories of antitrust impact, Pet. App. 186a, the court nonetheless concluded that the model remained valid because Dr. McClave's "selection of the DBS screen" was "merely his method of choosing counties to serve as comparators," rather than an endorsement of the "DBS foreclosure theory" of antitrust impact, and "[a]ny anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties," *id.* at 187a. The district court did not address whether the "anticompetitive conduct" that is "reflected in the Philadelphia DMA price" (*ibid.*) would include theories that the court had rejected. Instead, the court simply declared that "there is a common methodology available to measure and quantify damages on a class-wide basis." *Id.* at 91a; *see also id.* at 187a.

3. A divided panel of the Third Circuit affirmed. All three judges agreed that, "[t]o satisfy . . . the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a (majority); *see also id.* at 55a n.5 (dissent). The panel disagreed, however, on whether Plaintiffs had carried this burden.

a. The majority declined to address Comcast's challenges to Plaintiffs' damages model on the ground that "[w]e have not reached the stage of determining on the merits whether the methodology [offered by Plaintiffs] is a just and reasonable inference or speculative," Pet. App. 47a, and that Comcast's "attacks on the merits of the methodology" have "no place in the class certification inquiry," *id.*

at 48a. And while the majority apparently agreed that Dr. McClave's model does not satisfy the standards for admission of expert testimony under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), it examined only whether the model "could evolve to become admissible evidence," Pet. App. 44a n.13, and accepted Plaintiffs' "assur[ances]" to that effect, *id.* at 46a.

b. Judge Jordan, in contrast, would have vacated the class certification order. Pet. App. 53a (Jordan, J., dissenting in relevant part). "Part[ing] ways with the Majority entirely" on the damages issue, Judge Jordan concluded that "Dr. McClave's testimony is incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA." *Id.* at 65a-66a. Judge Jordan noted that Dr. McClave's model was not limited to "the only surviving theory of antitrust impact," *i.e.*, "that clustering reduced overbuilding." *Id.* at 69a. And it therefore "produces damages calculations that 'are not the certain result of the wrong.'" *Id.* at 70a (quoting *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)).

Judge Jordan faulted the majority for declining to address Comcast's "attacks on the merits of [Dr. McClave's] methodology," and for accepting without proof that any errors in the model could be fixed by "modify[ing]" it. Pet. App. 80a n.28 (internal quotation marks omitted). "Plaintiffs have the burden of establishing predominance," he emphasized, "and, until they have actually proffered a model that shows how damages can be calculated on a class-wide basis, they have not met that burden." *Id.* at 81a n.28. As Judge Jordan observed, the majority's "willingness to overlook the debilitating flaws in

Dr. McClave's model in an effort to avoid an 'attack on the merits'" is "precisely the kind [of] talismanic invocation of 'concern for merits-avoidance'" that controlling precedent forbids. *Ibid.* (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 n.17 (3d Cir. 2008)).

Yet even if Dr. McClave were to refine his model, Judge Jordan noted, "there remains an intractable problem with any model purporting to calculate damages for all class members collectively." Pet. App. 81a. The "major factors identified as influencing price . . . vary widely within the franchise areas across the DMA," particularly since "Comcast prices its cable service at the franchise level." *Id.* at 85a. "[N]o model can calculate class-wide damages," therefore, "because any damages—such as they may be—are not distributed on anything like a similar basis throughout the DMA." *Id.* at 86a.

SUMMARY OF ARGUMENT

Because Plaintiffs' damages model does not calculate damages from the sole theory of antitrust impact approved by the district court, and in any event is insufficiently helpful and reliable to be considered in the certification inquiry, Plaintiffs failed to carry their burden of proof under Rule 23. This Court should vacate the certification order.

I. Rule 23(b)(3) permits certification only where the district court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." That test cannot be satisfied here because there is no evidence that damages can be established through class-wide proof.

A. Under Section 4 of the Clayton Act, the class members must establish, as an element of their antitrust claims, measurable damages resulting from Comcast's allegedly anticompetitive behavior. As the lower courts recognized, Plaintiffs could satisfy Rule 23(b)(3)'s predominance requirement *only* by showing that they can prove damages on a class-wide basis using common proof.

Plaintiffs' sole effort to satisfy this burden was through Dr. McClave's damages model, but that model did not even *attempt* to measure damages from the only theory of antitrust impact credited by the district court, *i.e.*, that Comcast, by engaging in clustering, had deterred competition from overbuilders. Indeed, Dr. McClave admitted that he could not isolate the amount of damages attributable to any single theory, including the three rejected by the district court. *See* J.A. 189a-190a. Because Plaintiffs' damages model is "incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA," Pet. App. 66a (Jordan, J., dissenting in relevant part), Plaintiffs have no evidence *at all* on this critical element of their case for certification.

B. Plaintiffs' inability to adduce class-wide evidence of damages should have been fatal to their request for certification. The Third Circuit nonetheless dismissed Comcast's arguments as premature "[a]t the class certification stage," choosing instead to accept Plaintiffs' "assur[ances]" that damages "are capable of measurement and will not require labyrinthine individual calculations." Pet. App. 46a. The court believed itself limited to this inquiry because Comcast's arguments also relate to the "merits" of Plaintiffs' claims. *Id.* at 47a.

The Third Circuit based its refusal to resolve "merits" questions on *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), but this Court in *Wal-Mart Stores, Inc.* v. *Dukes* rejected that very interpretation of *Eisen* as "mistake[n]" and "contradicted by our other cases." 131 S. Ct. 2541, 2552 n.6 (2011). After *Dukes*, there can be no debate that the Third Circuit was required to resolve, not ignore, any "merits question[s]" bearing on "the propriety of certification under Rules 23(a) and (b)." *Ibid.*

By permitting class certification based solely on Plaintiffs' "assur[ances]," the Third Circuit not only violated Rule 23, but also fundamentally altered the rights of the parties—in direct contravention of the Rules Enabling Act.

C. Where, as in this case, damages calculations would require complicated mini-trials involving a massive number of claims, the question of damages predominates over any common issues in the case. Because Plaintiffs cannot prove damages on a class-wide basis, and because they cannot obtain certification if they are required to provide individualized evidence of damages, the certification order here should be vacated.

II. Even if this Court were to assume that Plaintiffs' model were relevant to proving damages in this case, it nonetheless cannot be invoked in support of class certification because the model fails to satisfy the helpfulness and reliability requirements for expert evidence under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

A. The district court must consider whether the evidence that the proponent claims could be presented on a class-wide basis would satisfy the require-

ments for admissibility at trial. In the context of expert evidence, in particular, the district court must determine whether the expert's opinion satisfies the standards imposed by Rule 702 and *Daubert*.

The need for scrutiny under Rule 702 and *Daubert* is particularly pronounced given the requirement that district courts resolve factual disputes where necessary to determine whether Rule 23 is satisfied. Just as courts cannot delegate their gatekeeping responsibilities under Rule 23 to the proponent of certification, they also cannot delegate those responsibilities to the proponent's hired experts.

B. Dr. McClave's damages model is neither helpful nor reliable in assessing class-wide damages. He attempted to measure "but-for" prices in the Philadelphia DMA by selecting comparable counties across the country where prices were not affected by the alleged antitrust violations. But the two screens that he used to do so—DBS Penetration and Market Share—select benchmark counties with significantly more competition from satellite providers, as well as a market share for Comcast based on a gross underestimate of its share of the Philadelphia market even before the conduct at issue. These flaws both inflate the "but-for" prices observed by Dr. McClave's model.

And even if these defects could be fixed, there remains an intractable problem with measuring damages across the Philadelphia DMA: The substantial variation in but-for conditions in the region makes the calculation of *any* class-wide prices impossible.

III. Because Rule 23(b)(3)'s predominance requirement is designed to ensure that the class is sufficiency cohesive to warrant collective treatment, the Third Circuit's failure to resolve all arguments bear-

ing on that requirement leaves the parties and courts with no assurance that the certified class will advance Rule 23's efficiency and fairness goals.

ARGUMENT

To satisfy Rule 23, and show that the proposed class is "sufficiently cohesive to warrant adjudication by representation," Plaintiffs were required to prove that common questions in this case predominate over individual ones. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). Yet Plaintiffs' only evidence as to a critical element of their antitrust claims—Dr. McClave's damages model—did not and could not measure damages on a class-wide basis given its utter failure to identify damages attributable to Plaintiffs' remaining theory of antitrust impact or the enormous variations in competitive conditions that bear on the but-for prices for class members. And even ignoring these fatal problems, the model could not establish class-wide damages because it was insufficiently helpful and reliable to satisfy the minimum requirements for expert evidence. Plaintiffs therefore failed to carry their burden under Rule 23, and class treatment is inappropriate. The decision below should be reversed and the certification order vacated.

I. PLAINTIFFS FAILED TO CARRY THEIR BURDEN OF PROVING THAT COMMON QUESTIONS PREDOMINATE.

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). While "[a] class action . . . enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits," of necessity "it leaves the parties' legal

rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). A class action is "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980). The procedural nature of a federal class action is statutorily required: The Rules Enabling Act simultaneously authorized this Court to promulgate the Federal Rules of Civil Procedure and mandated that such rules shall not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Rule 23, adopted in its modern form in 1966 and substantively amended in 2003, provides several requirements for class actions: The class proponent must satisfy each of the four prerequisites of Rule 23(a) and also demonstrate that the case fits into one of the permissible categories of class actions listed in Rule 23(b). As relevant here, Rule 23(a)(2) permits certification only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see also Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2555 (2011) ("common" questions are those that are susceptible to resolution "on a classwide basis"). Under Rule 23(b)(3), the district court must find (among other things) that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *see also Amchem*, 521 U.S. at 623 (predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation").

A. The Damages Model Presented By Plaintiffs Failed To Measure Damages From The Only Remaining Theory Of Antitrust Impact.

Section 4 of the Clayton Act, which grants the private right of action to enforce the antitrust laws, provides that "any person who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the *damages by him sustained*." 15 U.S.C. § 15(a) (emphases added). "To prevail in an antitrust action," therefore, "a plaintiff must show both an injury to his business [or property] resulting from the defendants' wrongful actions, and some indication of the amount of the damage done"—that is, *both* the "fact of damage" (*i.e.*, antitrust impact) *and* the "measure of damage." *In re Plywood Antitrust Litig.*, 655 F.2d 627, 635 (5th Cir. 1981); *see also, e.g.*, *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981) (antitrust plaintiff must "establish cognizable injury attributable to an antitrust violation and some approximation of damage").

Thus, as the courts and parties agreed below, proof of "measurable damages" is an essential element of Plaintiffs' antitrust claims. Pet. App. 15a, 54a n.3 (Jordan, J., dissenting in relevant part), 96a; D.E. 331, at 1 ("element of quantifiable damages"). The authorities are in accord. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) ("elements of [antitrust] claim" include "measurable damages"); *In re Visa Check / MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (Sotomayor, J.) ("required elements of an antitrust claim" include "damages"); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th

Cir. 1998) ("proof of actual, individual damages" is a "critical element of a plaintiff's antitrust claim").

Because the need to prove individualized damages for each of the two million class members would overwhelm any purportedly common questions in this litigation, the Third Circuit acknowledged that Plaintiffs could satisfy Rule 23(b)(3)'s predominance requirement *only* by "establish[ing] that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a. Plaintiffs did not dispute that proposition in the district court, in the court of appeals, or in this Court. *See, e.g.*, D.E. 331, at 5 ("The court must instead find that we have identified *common* proof tending to show class wide impact and damages"); Opp. 13 n.1 (agreeing with Comcast's assertion that "they have to prove that . . . they can establish damages by a common and credible and reliable damages methodology").

During the class certification proceeding, Plaintiffs advanced four separate theories of antitrust impact, including that Comcast (1) deterred competition by potential overbuilders; (2) foreclosed competition from DBS service providers; (3) eliminated "benchmark" competition, on which customers rely to compare the prices charged by market competitors; and (4) increased its bargaining power with content providers, such as networks, thus allowing it to negotiate lower prices for content. *See* Pet. App. 111a-112a. The district court, however, rejected all but the first theory of antitrust injury, leaving overbuilder deterrence as the sole basis on which Plaintiffs could seek damages. *See id.* at 192a-193a; *see also id.* at 9a.

The district court's rejection of three-quarters of the theories by which Plaintiffs claimed the class

members suffered injury has obvious implications for Plaintiffs' damages model. Yet their expert, Dr. McClave, did not change his conclusions to take into account the district court's ruling on antitrust impact. That is because, as Dr. McClave was forced to acknowledge at the class certification hearing, his damages model *cannot* isolate damages attributable to any of the specific conduct originally alleged by Plaintiffs to be unlawful. *See* J.A. 189a-190a. Rather, as Dr. McClave admitted, his model simply "take[s] the alleged anticompetitive conduct as a whole and evaluate[s] the impact from that conduct," *id.* at 189a, rather than "try[ing] to show the impact on the class from just the allegations related to clustering on their own," *id.* at 190a; *see also* Pet. App. 46a ("the model calculates supra-competitive prices regardless of the type of anticompetitive conduct").

Tellingly, "[f]or thirteen of the eighteen counties in the Philadelphia DMA, Dr. McClave's opinion does not even *attempt* to show that there were elevated prices resulting from reduced overbuilding," Pet. App. 71a (Jordan, J., dissenting in relevant part) (emphasis added), because the only alleged overbuilder had "indicated it planned to enter," and compete with Comcast in, only five of the counties, *see* J.A. 1382a. Yet Dr. McClave's model nonetheless calculates damages for *each* of the sixteen DMA counties in which Comcast operated. *See* J.A. 1394a-1396a tbl. A.2. "For the remaining counties," Judge Jordan noted, "this much is certain: the elevated prices identified by Dr. McClave" were "the result of something other than reduced overbuilding." Pet. App. 73a. Thus, "not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show [for these counties] that damages can be proven using

any evidence whatsoever—common or otherwise." *Ibid.*

It is well-established that a damages model cannot provide a reasonable basis for awarding damages by assuming full liability on multiple allegedly anticompetitive acts, only some of which are ultimately found to be unlawful. *See MCI Commc'ns Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1163 (7th Cir. 1983) (requiring new trial on damages where proffered model calculated aggregate damages assuming full liability on twenty-two counts, but liability was established only as to seven counts). That is so because any damages model that does not distinguish "losses resulting from unlawful, as opposed to lawful, competition" cannot be credited. *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975); *see also Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) (same).

Because Dr. McClave made *no* effort to determine whether his analysis would permit calculation of class-wide damages when limited to the only remaining theory of antitrust impact, he "fail[ed] to identify the 'but for' conditions that are relevant to what is now the only impact of Comcast's allegedly anticompetitive conduct." Pet. App. 71a (Jordan, J., dissenting in relevant part); *see also Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998) (rejecting "[s]tatistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining"). His damages model "no longer fits the case" (Pet. App. 67a n.18 (Jordan, J., dissenting in relevant part)) because it "is incapable of identifying any damages caused by reduced overbuilding in the

Philadelphia DMA." *Id.* at 66a. And that is particularly true because not only did Dr. McClave make no effort to analyze separately the various theories of antitrust impact, "any 'damages' identified by Dr. McClave with respect to th[e] thirteen counties" in which there was no reduced overbuilding are "'not the certain result'" of the allegedly unlawful conduct, and indeed "'may be substantially attributable to lawful competition.'" Pet. App. 73a (Jordan, J., dissenting in relevant part) (quoting *Coleman*, 525 F.2d at 1353).

B. The Third Circuit Could Not Cure The Defect In Plaintiffs' Proof By Dismissing Comcast's Arguments As "Merits" Issues.

The courts below could not possibly conclude that Plaintiffs carried their burden of proving that damages can be established on a class-wide basis for the simple reason that they did not present *any* evidence of damages stemming from their only remaining theory of antitrust impact. This is a failure of proof at the most basic level: Plaintiffs bore the burden of proof on this issue, yet they (through their expert) could not carry it. That should have been the end of the certification inquiry.

The Third Circuit nonetheless declined to consider Comcast's arguments, claiming that "[w]e have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." Pet. App. 47a. "At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages," the court insisted, "but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of

measurement and will not require labyrinthine individual calculations." *Id.* at 46a. The Third Circuit's reasoning—that it could decline to address "merits" issues and simply accept Plaintiffs' "assurances" that class-wide proof will be forthcoming—violates bedrock principles of class certification.[3]

1. The plain text of Rule 23(b)(3) permits certification only where the district court "*finds* that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added). The proponent of certification therefore must adduce sufficient evidence to "convinc[e]" the court that the case can be tried to judgment on predominantly class-wide proof. *Dukes*, 131 S. Ct. at 2552, 2556 (emphasis omitted). As this Court held in *General Telephone Co. of the Southwest* v. *Falcon*, class certification thus requires a "rigorous analysis" to ensure that Rule 23's prerequisites are satisfied. 457 U.S. 147, 160 (1982).

Nothing in Rule 23 provides an exception to its stringent requirements where the issues bearing on certification "entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S. Ct. at 2551. To the contrary, this Court has recognized for over thirty years that "the class determination *gen-*

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[3] Plaintiffs' assurances were, in any event, empty. Following the district court's further narrowing of the case in response to Comcast's motion for summary judgment, the court expressly invited Plaintiffs to submit a new damages report tailored to their remaining claims. *See* D.E. 525, at 12:10-19. Plaintiffs, however, declined this invitation and instead filed a "supplemental" report by Dr. McClave based on his "original damages calculations," which continued to claim damages of $875 million. D.E. 512 Ex. 1, at 1, 9.

erally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" and that courts should "probe behind the pleadings" when necessary "before coming to rest on the certification question." *Falcon*, 457 U.S. at 160-61 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469 (1978)) (emphasis added).

Even before this Court's most recent guidance on the issue in *Dukes*, the courts of appeals generally recognized that district courts must resolve any factual inquiries bearing on class certification, regardless of whether they overlapped with the merits. *See, e.g.*, *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001), *cited with approval in Dukes*, 131 S. Ct. at 2552. Some courts, however, had interpreted the Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), as requiring a different approach, *see, e.g.*, *Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 291-92 (2d Cir. 1999), *abrogated by In re IPO Sec. Litig.*, 471 F.3d 24, 32-34 (2d Cir. 2006).

In *Eisen*, the Court held that a district court could not examine the merits of the lawsuit in deciding whether to shift the cost of notice to the class. 417 U.S. at 177-78. In dictum, however, the Court remarked: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be *maintained* as a class action." *Id.* at 177 (emphasis added). This dictum "led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits," and "led other courts to think that a judge may not do so at least with respect to a prerequisite of

Rule 23 that overlaps with an aspect of the merits of the case." *IPO Sec. Litig.*, 471 F.3d at 33 (discussing *Caridad* and similar cases).

This reading of *Eisen* was undermined, however, by several changes to Rule 23 that were made in 2003, which confirmed that district courts must make a "definitive determination that [its] requirements . . . have been met." *Hydrogen Peroxide*, 552 F.3d at 320. Although Rule 23(c)(1) previously had allowed for "conditional" certification of class actions, this provision was eliminated on the ground that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23 advisory committee's note, 215 F.R.D. 158, 217 (2003) ("2003 Advisory Committee's Note"). Similarly, while Rule 23(c)(1)(A) once stated that class certification should be decided "as soon as practicable," it now requires only that the certification decision be made "at an early practicable time"—an acknowledgment that "[a]llowing time for limited discovery supporting certification motions may be necessary for sound judicial administration." *Hydrogen Peroxide*, 552 F.3d at 318-19 (ellipsis and internal quotation marks omitted); *see also Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004).

Together, these amendments "combine to permit a more extensive inquiry into whether Rule 23 requirements are met" than might previously have been deemed "appropriate" by some courts. *IPO Sec. Litig.*, 471 F.3d at 39. And the consensus view of the courts of appeals after 2003 was therefore that *Eisen* imposed no limitations on review of "merits" issues at the certification stage. *See, e.g., Hydrogen Peroxide*, 552 F.3d at 318-19.

2. This Court clarified in *Dukes* that expansive readings of *Eisen* were "mistake[n]." 131 S. Ct. at 2552 n.6. *Dukes* reiterated that the district court must consider and resolve any "merits question" that bears on class certification, even if the plaintiff "will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." *Ibid.*

a. Following this approach, the Court in *Dukes* closely scrutinized—and ultimately rejected—the expert testimony offered in an attempt to satisfy Rule 23(a)'s commonality requirement. After noting that "proof of commonality necessarily overlap[ped] with [the plaintiffs'] merits contention that Wal-Mart engage[d] in a pattern or practice of discrimination," this Court analyzed the plaintiffs' evidence of company-wide discrimination to determine whether it was "convincing," and concluded that it was not. 131 S. Ct. at 2552, 2556 (emphasis omitted).

Dukes reaffirmed that "Rule 23 does not set forth a mere pleading standard," but rather "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to *prove*" that Rule 23's requirements are "*in fact*" satisfied. 131 S. Ct. at 2551 (first emphasis added); *see also, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 316 ("[T]he requirements set out in Rule 23 are not mere pleading rules"). And, as the Third Circuit acknowledged below, *Dukes* also "confirmed" that the "rigorous analysis" required by Rule 23 "'[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim." Pet. App. 14a n.6 (quoting 131 S. Ct. at 2551).

b. The Third Circuit nevertheless believed that "*Eisen* still prohibits '*a merits inquiry for any other pretrial purpose*.'" Pet. App. 14a n.6 (quoting *Dukes*,

131 S. Ct. at 2552 n.6) (emphasis added). This selective quotation from *Dukes* gets the analysis backwards: The Court squarely held in *Dukes* that *Eisen* has *no* applicability in "determin[ing] the propriety of certification under Rules 23(a) and (b)." 131 S. Ct. at 2552 n.6.

Indeed, the passage from *Dukes* quoted by the Third Circuit expressly cautions the lower courts *against* reading *Eisen* as the Third Circuit did. After noting that the only issue in *Eisen* was the propriety of shifting the costs of notice, as to which no inquiry into the merits is permissible, *Dukes* emphasized that, "[t]o the extent [*Eisen*'s dictum] goes beyond the permissibility of *a merits inquiry for any other pretrial purpose*," "it is the purest dictum and is contradicted by our other cases." 131 S. Ct. at 2552 n.6 (emphasis added). This Court's reference to "any other pretrial purpose" (*ibid.*) limits any future application of *Eisen* to cost-shifting of class notice. *Dukes* could not have been clearer that *Eisen* imposes no limitation on judicial resolution of whether the Rule 23 factors have been satisfied.

Yet the Third Circuit nonetheless expressly invoked and relied upon *Eisen* (no fewer than six times) to justify its crabbed view of the issues properly before it at the certification stage—"[t]o require more" from Plaintiffs, it insisted, would "contraven[e] *Eisen*." Pet. App. 33a. This reasoning cannot be squared with *Dukes*.

c. The Third Circuit, perhaps recognizing that its refusal to resolve Comcast's challenges to Plaintiffs' expert damages model was inconsistent with *Dukes*, said that *Dukes* "neither guides nor governs the dispute" in this case. Pet. App. 41a n.12. In its view, "[t]he factual and legal underpinnings of

[*Dukes*]—which involved a massive discrimination class action and different sections of Rule 23—are clearly distinct from those of this case." *Ibid.* In opposing certiorari, Plaintiffs did not bother to defend this aspect of the Third Circuit's reasoning, and for good reason: It is plainly incorrect.

The Third Circuit never explained why it is significant that *Dukes* arose in the discrimination context. This Court turned to the allegations "[i]n this case" (*Dukes*, 131 S. Ct. at 2552) only *after* clarifying the proper standards under Rule 23; its analysis was not limited to discrimination but instead interpreted Rule 23 generally—as one would expect given this Court's holding in *Falcon* that the "rigorous analysis" it described is required before certifying "*any*" class action. 457 U.S. at 161 (emphasis added); *see also, e.g.*, *Shady Grove*, 130 S. Ct. at 1437 ("Rule 23 provides a one-size-fits-all formula for deciding the class-action question").

Nor is it significant that *Dukes* was decided under Rule 23(a)(2)'s commonality requirement, whereas this case involves Rule 23(b)(3). The relevant portion of the opinion—that *Eisen* does not foreclose an inquiry into "the propriety of certification *under Rules 23(a) and (b)*" (*Dukes*, 131 S. Ct. at 2552 n.6 (emphasis added))—applies equally to Rule 23(b)(3). This is unsurprising because the two requirements are related: To conclude that the proponent has satisfied Rule 23(a), the district court must find that "there are questions of law or fact common to the class," and Rule 23(b)(3) certification is appropriate if the district court "finds" (among other things) "that *the* questions of law or fact common to class members predominate over any questions affecting only individual members" (emphasis added). The commonali-

ty inquiry thus bears directly on both requirements: Once the common questions have been identified under Rule 23(a), the court must determine whether they predominate under Rule 23(b)(3). It would make no sense to require a searching inquiry under Rule 23(a) while permitting a more lenient inquiry to satisfy Rule 23(b)(3)'s "far more demanding" requirement. *Amchem*, 521 U.S. at 623-24; *see also, e.g.*, *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (Sotomayor, J.) (predominance is a "more demanding criterion than the commonality inquiry under Rule 23(a)").

3. By declining to address supposed "merits" issues bearing on certification, and instead accepting Plaintiffs' "assur[ances]" on those points, the Third Circuit violated the basic rule that "actual, *not presumed*, conformance" with Rule 23's prerequisites is essential. *Falcon*, 457 U.S. at 160 (emphasis added); *see also, e.g.*, *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) ("The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification").

And the Third Circuit's watered-down approach to class certification is even more problematic because it would relieve the class members of their burden of proving damages at trial, and would deprive Comcast of its right to defend against the class members' claims—in direct violation of the Rules Enabling Act. *See* 28 U.S.C. § 2072(b). Allowing Plaintiffs' claims to be tried as a class action without a means of proving damages on a class-wide basis, and without requiring individual proof of damages, would modify the parties' substantive rights in three separate respects:

First, "allowing gross damages by treating unsubstantiated claims of class members collectively" would "significantly alte[r] substantive rights." *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974). As the Ninth Circuit has explained, such an approach is "clearly prohibited" by the Rules Enabling Act. *Ibid.*; *see also Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) ("[g]eneralized" damages evidence is inconsistent with the "mandate of the Rules Enabling Act"). And the Court in *Dukes* signified its agreement with this point when it rejected a "Trial by Formula" variant of the "gross damages" theory. 131 S. Ct. at 2561.

Second, the district court's certification order relieves the class members of the burden of proving an element of their claims because they would be permitted to recover without adducing any proof of individualized damages, even though the only theory of class-wide damages cannot actually establish damages on a class-wide basis. The Rules Enabling Act does not permit certification if it requires eliminating a claim element that would have to be proved in a non-class case. *See Hohider* v. *UPS*, 574 F.3d 169, 196 (3d Cir. 2009) (rejecting certification "[b]ecause the statutorily required inquiry" into a particular element is "incompatible with the requirements of Rule 23," and "because plaintiffs cannot adjudicate their claims and requested relief without it"); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) (cautioning against approaches that would "alter defendants' substantive right to pay damages reflective of their actual liability").

Third, the class members' damages similarly "cannot be presumed" because Comcast "ha[s] the right to raise individual defenses against each class

member." *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001); *see also Dukes*, 131 S. Ct. at 2561 ("a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims"). Negating a claim element—here damages—is an available defense in most cases, and a class cannot be certified if it requires precluding the defendant from asserting this defense.[4]

C. The Need For Individualized Proof Of Damages Prevents Certification In This Case.

Because Plaintiffs have no class-wide evidence of damages, they would be required to prove that issue on an individualized basis across the nearly two million class members. This "need for . . . individualized inquiries" into damages across the range of Comcast's franchise areas would overwhelm any purportedly common questions in the case, and precludes certification under Rule 23(b)(3). *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 304 (5th Cir. 2003).

1. As the courts of appeals have acknowledged, certification may be appropriate under Rule 23(b)(3) where common questions of liability predominate, "even when there are some individualized damage issues." *Visa Check*, 280 F.3d at 139; *see also, e.g.*, *Arreola* v. *Godinez*, 546 F.3d 788, 801 (7th Cir. 2008) (certification may be appropriate where "there are

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[4] For this reason, the Third Circuit's approach would also contravene Comcast's right, "guaranteed . . . by the Due Process Clause," to "litigate the issues raised," *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971), which includes the ability "to present every available defense," *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted).

substantial common issues that outweigh the single variable of damages amounts"). For this reason, "the need for individual damages determinations does not, *in and of itself*, require denial of [a] motion for [class] certification." *Ibid.* (emphasis added).

At the same time, the "Herculean task" of calculating individual damages in certain cases "counsels against finding predominance." *Newton*, 259 F.3d at 187; *see also, e.g.*, *Ward* v. *Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) ("individualized damage determinations cut against class certification under Rule 23(b)(3)"); *Broussard*, 155 F.3d at 342-43 (reversing class certification order given "inherently individualized" damages claims). And "where the issue of damages" would "requir[e] separate mini-trial[s] of an overwhelming[ly] large number of individual claims," the "staggering problems of logistics thus created make the damage aspect of [the] case predominate, and render the case unmanageable as a class action." *Windham*, 565 F.2d at 68 (footnotes and internal quotation marks omitted).

In this respect, the element of damages in antitrust cases (or other cases where proof of damages is an element of the plaintiff's claim) is similar to other claim elements that will preclude class certification in the absence of an acceptable method of class-wide proof. This Court explained in *Basic Inc.* v. *Levinson*, for example, that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class" in a securities-fraud lawsuit "effectively would . . . preven[t] [them] from proceeding with a class action, since individual issues then would have overwhelmed the common ones." 485 U.S. 224, 242 (1988); *see also, e.g.*, *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("a

fraud class action cannot be certified when individual reliance will be an issue"). Some securities-fraud cases, such as those involving secondary trades on open and developed domestic markets, can proceed as class actions because reliance is presumed as a matter of substantive law. *See Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184-85 (2011). In the absence of such a presumption (or where the presumption is rebutted), however, individualized questions of reliance prevent certification of fraud claims. *See McLaughlin*, 522 F.3d at 223-25; *see also IPO Sec. Litig.*, 471 F.3d at 43 ("Without the *Basic* presumption, individual questions of reliance would predominate over common questions").

Damages are not presumed in this or any other antitrust case—they must be proven at trial as an element of the plaintiff's claim. Thus, at the class certification stage, the proponent has the burden of proving that individualized damages questions will not predominate over any common questions in the case. This may be accomplished, in appropriate cases, by a viable theory of class-wide damages that is supported by the evidence. In the absence of such a well-founded damages theory, certification will be inappropriate. *See, e.g.*, *Broussard*, 155 F.3d at 343 (rejecting "'hypothetical or speculative' evidence, divorced from any actual proof of damages," as a substitute for the requisite "proof of individual damages").

2. In this case, individualized damages inquiries preclude certification in the absence of some class-wide method of proof. Indeed, the Third Circuit concluded, and Plaintiffs did not dispute, that they could obtain certification *only* by "establish[ing] that the alleged damages are capable of measurement on a

class-wide basis using common proof." Pet. App. 34a; *see also, e.g.*, *Broussard*, 155 F.3d at 342-43 ("the need for individual proof of damages bars class certification in some antitrust cases"). Having failed to do so, Plaintiffs cannot establish the predominance required for certification. *See supra* at 23 n.3.

On Plaintiffs' estimate, there are two million members of the class certified by the district court. J.A. 35a ¶ 32. If these class members were required to establish damages on an individual basis, and even assuming (quite fancifully) both that it would take only 10 minutes for each class member to do so and that the district court were operating around the clock, it would take more than 38 years to adjudicate all of their claims. Under these circumstances, "this suit raises far too many individual questions to qualify for class action treatment." *Hotel Tel. Charges*, 500 F.2d at 89 (reversing decision granting class certification given individualized damages questions); *see also, e.g.*, *Windham*, 565 F.2d at 70 ("The district court estimated . . . that, in the absence of a practical damage formula, determination of individual damages in this case could consume ten years of its time").

The fact that individual damages questions would predominate in this case, in the absence of class-wide proof, is further demonstrated by the complexity of the questions involved. Plaintiffs' theory of antitrust injury is that they paid more for their cable service than they would have paid in a hypothetical, "but-for" world in which Comcast did not (allegedly) deter competition from overbuilders. But to measure the resulting damages, Plaintiffs must construct—as Dr. McClave attempted to do—a "but-for" world. Because they have no evidence that it is possible to do so on a class-wide basis, *see supra*

Part I.A, Plaintiffs could prove their claims only by developing an enormous volume of "but-for" pricing information—at a *minimum* for each of the roughly 650 franchise areas in the Philadelphia DMA. Under these circumstances, Plaintiffs "have clearly failed to demonstrate that common issues of fact predominate over those individual issues of fact that are plainly necessary for any just estimate of the antitrust damages suffered by the class members." *Bell Atl.*, 339 F.3d at 307-08.

* * *

This Court has consistently, and repeatedly, admonished against "adventurous application" of Rule 23. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *see also Dukes*, 131 S. Ct. at 2561 (disapproving "novel" approach to certification). The Third Circuit, however, adopted an approach that would permit class-wide litigation of a critical element of Plaintiffs' claims without any class-wide evidence on that element, instead simply accepting their "assur[ances]" (Pet. App. 46a) that they could adduce such proof. This is not a permissible approach to class certification.

II. PLAINTIFFS DID NOT ADDUCE SUFFICIENTLY HELPFUL AND RELIABLE EVIDENCE THAT CLASS-WIDE QUESTIONS PREDOMINATE OVER INDIVIDUAL ONES.

The preceding discussion establishes that Plaintiffs' failure to adduce any relevant evidence of class-wide damages under their sole remaining legal theory is sufficient, by itself, to warrant reversal of the decision below and vacatur of the certification order. But even if the Court were to assume, as the Third Circuit impermissibly did, that Dr. McClave's damages model could potentially be modified to measure

harm from deterred overbuilding on a class-wide basis, it should nonetheless reverse the decision below.

Where, as here, the proponent of class certification attempts to satisfy its burden of proving that common questions predominate through expert evidence, the court must examine that evidence to determine whether it is sufficiently helpful and reliable for the purpose. And even then, the court must examine the expert evidence in light of the remaining evidentiary materials before it, including competing expert opinions, to decide whether the proponent has carried its burden. If the evidence does not meet the threshold helpfulness and reliability requirements for expert evidence, as Plaintiffs' damages model does not, it cannot satisfy the proponent's burden.

A. Expert Opinion Evidence Admitted In Support Of Class Certification Must Satisfy Rule 702 And *Daubert*.

The "determinations" required by Rule 23 and this Court's precedents "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established." *IPO Sec. Litig.*, 471 F.3d at 41; *see also, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 316-17. This, in turn, means that the court "must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." *Id.* at 324; *see also, e.g.*, Fed. R. Civ. P. 43(c) ("the court may hear [a motion] on affidavits or may hear it wholly or partly on oral testimony or on depositions").

While a district court has discretion to consider a wide variety of evidentiary submissions in ruling on a certification motion, however, not all submissions

will assist the court in making the requisite findings. As Judge Jordan noted below, "[a] court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything." Pet. App. 66a n.18. When affidavits, declarations, or expert reports represent to the court and the opposing party that the witness would be capable of testifying as to their contents, therefore, "simple logic" dictates that the court must consider whether that testimony would ultimately be admissible at trial before crediting it in the certification inquiry. *Ibid.*; *see also, e.g.*, *Unger*, 401 F.3d at 319 ("findings must be made based on adequate admissible evidence to justify class certification").

In the context of expert opinion testimony such as Dr. McClave's damages model, Federal Rule of Evidence 702 establishes the basic requirements under which an expert "may testify in the form of an opinion or otherwise," subject to the other requirements for admissibility applicable to all evidence. *See, e.g.*, *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 141 (1999). And this Court's opinion in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), makes clear that Rule 702 "imposes a special obligation upon a trial judge" (*Kumho Tire*, 526 U.S. at 147) to "ensure that any and all scientific testimony" is "not only relevant, but reliable." 509 U.S. at 589.

In *Dukes*, this Court noted that the district court in that case had "concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." 131 S. Ct. at 2553-54. While it was unnecessary for the Court to resolve that issue definitively, it "doubt[ed]" that the district

court was correct. *Id.* at 2554. And the Court's "doubt[s]" were well-founded: Certifying a class action without subjecting expert evidence presented in support of certification to the threshold inquiries required by Rule 702 and *Daubert* would "amoun[t] to a delegation of judicial power to the plaintiffs," who could then "obtain class certification just by hiring a competent expert." *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

1. Rule 702's standards regarding when expert witnesses "may testify in the form of an opinion or otherwise" (Fed. R. Evid. 702) does not contain any exception that would limit its applicability to the admission of evidence *at trial*. To the contrary, Rule 702's primary aim—to "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *Kumho Tire*, 526 U.S. at 152—is "equally applicable in the class certification context." *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 639 (9th Cir. 2010) (en banc) (Ikuta, J., dissenting), *rev'd*, 131 S. Ct. 2541 (2011).

But whether or not Rule 702 would apply of its own force to all pre-trial determinations, the purpose of the certification inquiry is to evaluate the evidence that likely will be presented at trial, which necessarily entails consideration of whether the expert opinions embodied in the reports or testimony could be admitted consistent with Rule 702. For this reason, "when an expert's report or testimony is critical to class certification," the "district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). "That is," the Sev-

enth Circuit emphasized, "the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants." *Id.* at 816; *see also ibid.* (courts "must . . . resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification"); *Sher* v. *Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (agreeing with *American Honda*).

Indeed, it is difficult to see how district courts could *decline* to apply Rule 702 and *Daubert* given their need to determine whether Rule 23's requirements are "*in fact*" satisfied. *Dukes*, 131 S. Ct. at 2551. If, as in this case, the proponent of class certification attempts to satisfy the predominance requirement through expert evidence purportedly establishing a class-wide method of proof, the district court could not "fin[d] that the questions of law or fact common to class members predominate over any questions affecting only individual members" (Fed. R. Civ. P. 23(b)(3)) without asking whether the expert's opinion is sufficiently helpful and reliable. If the opinion fails to satisfy these basic prerequisites for admissibility, then it could not be introduced at trial, and the class members would be left in the same position as if the expert had never been retained—that is, needing to prove their claims on an individualized basis. *See McLaughlin*, 522 F.3d at 229 ("requisite showing" to support "legal theory" used to satisfy Rule 23 is that the proponents "could, at trial, marshal facts sufficient to permit them to rely upon it"). "Requiring a full *Daubert* analysis" is thus a "natural extension of the concept that class certification . . . should be permitted only after a rigorous application of Rule 23's requirements." *In re*

Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 628 (8th Cir. 2011) (Gruender, J., dissenting).[5]

2. Moreover, Rule 702 and *Daubert* are only the *starting* point for a district court's analysis under Rule 23. In addition to "determin[ing]" that the proffered expert evidence satisfies the "evidentiary standard set forth in *Daubert*," district courts must *also* "resolve any factual disputes necessary to determine" whether that evidence—considered in light of the remaining factual record—is sufficient to satisfy Rule 23's prerequisites. *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011); *see also, e.g.*, *Dukes*, 131 S. Ct. at 2553-54 (assuming that expert testimony was "properly considered" but finding it insufficiently persuasive to support certification); *IPO Sec. Litig.*, 471 F.3d at 33, 42 (proponent of class certification must do more than put forth "some evidence" that the rule's prerequisites are satisfied).

Indeed, the "suggestio[n] that *Daubert*-worthy expert testimony supporting the proposed aggregate unit should suffice to elicit class certification" is "only

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[5] Creating a circuit split with the Seventh, Ninth, and Eleventh Circuits, the Eighth Circuit held in *Zurn Pex* that something less than a "full *Daubert* inquiry" is warranted "at the class certification stage." 644 F.3d at 612. Yet even the Eighth Circuit, unlike the Third Circuit below, acknowledged that district courts must engage in *at least* a "focused *Daubert* analysis" that "scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Id.* at 614. Such a "tailored *Daubert* analysis" (*ibid.*) would be more than adequate to doom Dr. McClave's damages model in this case. *See infra* Part II.B. In any event, the Eighth Circuit's decision to defer application of the full inquiry required by *Daubert* until some later stage of litigation precludes it from making the findings required by Rule 23 and this Court's cases.

a half-step removed" from now-overturned decisions granting "class certification based on allegations in the complaint that track the requirements of Rule 23." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 125-26 (2009). "Certification based simply on the assertions in the complaint or an admissible expert submission exhibits a troubling circularity," as "[t]he legitimacy of aggregation as a procedural matter would stem from the shaping of proof that presupposes the very aggregate unit whose propriety the court is to assess." *Id.* at 126; *see also Ellis*, 657 F.3d at 982 ("to the extent the district court limited its analysis of whether there was commonality to a determination of whether Plaintiffs' evidence on that point was admissible, it did so in error").

Any contrary approach—deeming Rule 23 to be satisfied based on expert opinions that would meet only the baseline requirements imposed by Rule 702 and *Daubert*—would simply "han[d] off to experts" the "decision as to whether the elements of a claim are susceptible to common proof." Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 Rev. Litig. 405, 425 (2003); *see also* Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of* Daubert *and the Defendant's Proof*, 28 Rev. Litig. 71, 111 (2008). "A district judge," however, "may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits." *West*, 282 F.3d at 938. Instead, "[t]ough questions must be faced and squarely decided" at the certification stage, "if necessary by holding evidentiary hearings and choosing between competing perspectives." *Ibid.*

3. The Third Circuit, for its part, believed that even expert opinions that lack the helpfulness and reliability necessary to satisfy *Daubert* could still be used at the certification stage based on the possibility that they might "be refined" and "evolve" in a way that cures their defects. Pet. App. 44a n.13. Not so.

As an initial matter, the Third Circuit did not undertake any independent inquiry into how the expert testimony might "evolve" or "be refined," Pet. App. 44a n.13, but instead was content to accept Plaintiffs' "assur[ances]" (*id.* at 46a) to that effect. But this is analogous to accepting the allegations in a plaintiff's complaint as sufficient to satisfy Rule 23: By filing a complaint, after all, the filing attorney certifies that "the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3); *see also, e.g.*, Nagareda, *supra*, at 126. *Dukes* holds, however, that the proponent of certification must go beyond these types of assurances and provide *actual "proof."* 131 S. Ct. at 2552 (emphasis added). Plaintiffs failed to do so.

Even worse, the Third Circuit *acknowledged* that it could not tell whether the district court had actually found compliance with Rule 23. Instead, it said only that the district court *"likely* determined that Dr. McClave's model could be refined between the time when class certification was granted and trial so as to comply with *Daubert*." Pet. App. 44a n.13 (emphasis added). As this Court has held, however, "actual, *not presumed*, conformance" with Rule 23's prerequisites is necessary. *Falcon*, 457 U.S. at 160 (emphasis added). By resorting to speculation about the district court's analysis, the Third Circuit im-

permissibly engaged in the type of "presum[ptions]" forbidden by *Falcon*.

In any event, the Third Circuit could not find "actual . . . conformance" with Rule 23's prerequisites without first determining whether it had been presented with helpful and reliable evidence of class-wide damages. "[T]o say that the model might be fixed" is "no better" than saying it is sufficient for Plaintiffs to "have made 'a threshold showing' of predominance or shown a sufficient 'intention to try the case in a manner that satisfied the predominance requirement.'" Pet. App. 80a-81a n.28a (Jordan, J., dissenting in relevant part) (quoting *Hydrogen Peroxide*, 552 F.3d at 321). That is not good enough to satisfy Rule 23. *See Hydrogen Peroxide*, 552 F.3d at 318 ("A party's assurance to the court that it intends or plans to meet the requirements is insufficient"); *Windham*, 565 F.2d at 70 ("where the court finds . . . that there are serious problems now appearing, it should not certify the class merely on the assurance of counsel that some solution will be found").[6]

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[6] This Scarlett O'Hara approach to class certification—"I'll think about it tomorrow," *Gone with the Wind* (1939)—is also inconsistent with Rule 23(c)(1)(B)'s requirement that the certification order "*define* . . . the class claims, issues, or defenses" (emphasis added). This provision, added in 2003, "requires more specific and more deliberate treatment of the class issues, claims, and defenses" than prior practice "usually reflected." *Wachtel ex rel. Jesse* v. *Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185 (3d Cir. 2006). A "clear and complete statement of the claims, issues, or defenses to be treated on a class basis" is necessary both to "shed light" on whether Rule 23's prerequisites have been satisfied, and also to "aid courts and parties in meeting th[e] critical need" to determine how the case will be tried "by necessitating the full and clear articulation of the litigation's contours at the time of class certification." *Id.* at 186 (in-

[Footnote continued on next page]

B. DR. MCCLAVE'S DAMAGES MODEL DOES NOT SATISFY RULE 702 AND *DAUBERT*.

Dr. McClave's damages model suffers from several methodological problems that preclude it from serving as a "help[ful]" or "reliabl[e]" measure of damages. Fed. R. Evid. 702(a), (d). And even if these methodological problems could somehow be fixed, "there remains an intractable problem with *any* model purporting to calculate damages for all class members collectively," Pet. App. 81a (Jordan, J., dissenting in relevant part)—namely, that significant variations among the franchise areas in the Philadelphia DMA preclude any class-wide evidence of damages.

1. Dr. McClave's DBS Penetration screen included only counties where the DBS penetration rate was at or above the national average, on the theory that the DBS penetration rate in the Philadelphia DMA—which was below the national average—was "constrained by the anticompetitive behavior of Comcast." J.A. 1380a. Although that screen might have been appropriate if "DBS penetration had been [so] constrained," the district court instead found that "Plaintiffs failed to tie 'Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration.'" Pet. App. 74a (Jordan, J., dissenting in relevant part) (quoting *id.* at 120a). As a result, Judge Jordan emphasized, "there is no evidence in the rec-

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[Footnote continued from previous page]
ternal quotation marks omitted); *see also Hydrogen Peroxide*, 552 F.3d at 319 (noting that the advisory committee's notes to the 2003 amendments "introduc[ed] the concept of a 'trial plan'" to "focu[s] attention on a rigorous evaluation of the likely shape of a trial on the issues" (quoting 2003 Advisory Committee's Note, 215 F.R.D. at 217).

ord suggesting that DBS penetration in the Philadelphia DMA was in any way affected by Comcast's allegedly anticompetitive conduct," and no basis for Dr. McClave to correct for the below-average DBS penetration rate in Philadelphia by selecting as "benchmark" counties only those with higher than average penetration rates. *Id.* at 74a-75a.

As for Dr. McClave's Market Share screen, which eliminated counties in which Comcast had greater than 40% market share, "while Comcast's market share is relevant to the question of whether there has been any reduction in overbuilding, it is not relevant—at least not in isolation—to determining the damages caused by that reduction." Pet. App. 77a (Jordan, J., dissenting in relevant part). "By calculating the appropriate market share screen using only Comcast's average share throughout the Philadelphia DMA," Dr. McClave "ignored any market share that, in the 'but for' hypothetical world, would have been maintained by an incumbent other than Comcast." *Id.* at 79a. But "any market share screen applied to isolate the 'but for' conditions that would have prevailed in the Philadelphia DMA should screen not just for Comcast's share, but for the share of whatever incumbent would have been present but for the clustering." *Id.* at 78a; *see also, e.g.*, *Eleven Line, Inc.* v. *N. Tex. State Soccer Ass'n*, 213 F.3d 198, 208-09 (5th Cir. 2000) (expert using benchmark to derive but-for values must prove "reasonable similarity" between the benchmark and the but-for world).

It is undisputed that Comcast's market share *in the franchise areas where it operated* in 1998 substantially exceeded the 20% share that Dr. McClave used as his basis for claiming that 40% was an "approximate midpoint" between Comcast's market

share before and after the challenged conduct. J.A. 1380a; *see also id.* at 206a-207a, 1063a. By including, in his DMA-wide "average" market share, franchise areas where Comcast was not yet present, Dr. McClave "unfairly suppressed the relevant incumbent share and artificially inflated the damages calculation." Pet. App. 79a-80a & n.27 (Jordan, J., dissenting in relevant part).

2. Even assuming that these screening problems could be addressed in "refined" versions of Dr. McClave's damages model, that model cannot be used to prove class-wide damages unless the same "but-for" conditions would have been experienced throughout the entire Philadelphia DMA. If there are no common "but-for" conditions, then different class members—or groups of class members—would need to calculate different "but-for" pricing in order to measure damages, and no element of Plaintiffs' proposed damages proof would be "common" to all class members.

Dr. McClave's damages model proceeds on the assumption that the "price of cable television service in any given franchise area" is affected by the "relative market shares" of competing service providers, including overbuilders, DBS providers, and incumbent cable providers. Pet. App. 81a (Jordan, J., dissenting in relevant part). But "[i]f price does vary with the changes in relative share within a franchise area," Judge Jordan noted, "it is hard to see how th[e] 650 franchise areas" within the Philadelphia DMA "can simply be treated as average for purposes of proving damages." *Id.* at 82a.

Nonetheless, Dr. McClave developed his screens using DMA-wide averages, and also varied his "but-for" prices by county, not by franchise area. *See* J.A.

1380a, 1394a-1396a tbl. A.2. Yet "[t]he record indicates that . . . the 'but for' market shares of overbuilders, DBS providers, and incumbent providers would vary, sometimes significantly, from franchise area to franchise area." Pet. App. 82a (Jordan, J., dissenting in relevant part). And because "Comcast prices its cable service at the franchise level," *id.* at 85a, those variations will result in different "but-for" prices reflecting the different competitive conditions in each franchise area. In particular:

- The alleged overbuilder—RCN—had received FCC approval to overbuild in only five counties within the Philadelphia DMA. *See* Pet. App. 82a-83a (Jordan, J., dissenting in relevant part); *see also* J.A. 820a (showing RCN service areas). But while Dr. McClave's model assumed that clustering deterred overbuilding only in those five counties, *see* J.A. 1382a, his model nonetheless found "damages" in the other counties in which Comcast operated, *see id.* at 1394a-1396a tbl. A.2. Thus, whatever his model was measuring in those counties, it is not damages from deterred overbuilding. And even if RCN had expanded into other areas, "any overbuilding into the other parts of the Philadelphia DMA would . . . have come later than the overbuilding of the five [approved] counties." Pet. App. 83a (Jordan, J., dissenting in relevant part). "[W]hile some franchise areas might have been overbuilt early in the class period," "other franchise areas would likely never have been overbuilt at all or have been overbuilt only later in the class period." *Ibid.*; *see also* J.A. 1084a-1086a.

- As for DBS, Dr. McClave specifically acknowledged that "DBS penetration varies across the

cluster here" and that it was "possible that some of the counties in the Philadelphia DMA in fact have penetration that's above the national median." J.A. 203a; *see also* J.A. 821a. "[N]ot only does DBS penetration vary across the Philadelphia DMA," that is, "but the variation is pronounced enough that some parts of the Philadelphia DMA have above national average DBS penetration despite the fact that the Philadelphia DMA, as a whole, has DBS penetration at only half the national average." Pet. App. 83a (Jordan, J., dissenting in relevant part).

- With respect to incumbent market share, "Comcast's share prior to clustering varied markedly from franchise area to franchise area." Pet. App. 84a (Jordan, J., dissenting in relevant part) (citing J.A. 1063a). "And, where the other two components of market share—DBS penetration and overbuilding—vary from one franchise area to another, it becomes a near mathematical certainty that the remaining portion of the franchise held by incumbent cable providers must likewise vary." *Ibid.* (footnote omitted); *see also* J.A. 1083a-1087a.

As Judge Jordan noted, "[t]he wide variation in the relative market shares evidenced by the record makes it hard to imagine a means of calculating class-wide damages." Pet. App. 85a. "[T]o say that Comcast's 'but for' share of the market throughout the Philadelphia DMA would be, on average, 40%," he noted, "is about as meaningful as saying that 'with one foot on fire and the other on ice, I am, on average, comfortable.'" *Ibid.*

* * *

"The variation in conditions within the nearly 650 franchise areas in the Philadelphia DMA means that the issue of damages is more fractured than a single class can accommodate." Pet. App. 88a (Jordan, J., dissenting in relevant part). The Third Circuit erred both in rejecting "attacks on the merits of . . . Dr. McClave's methodology," and in permitting certification of a class without deciding whether the sole methodology supposedly permitting class-wide proof of damages was "a just and reasonable inference or speculative." Pet. App. 47a-48a. Just as this Court closely scrutinized in *Dukes* whether the plaintiffs had established class-wide discrimination by showing a company-wide policy, and concluded that they had not, 131 S. Ct. at 2553, this Court should conduct the scrutiny of Dr. McClave's opinions that the Third Circuit majority abjured, and conclude (as Judge Jordan did) that Plaintiffs offered no valid evidence in support of their class-wide theory of damages, on which their entire argument under Rule 23(b)(3) rests.

III. The Decision Below Undermines The Important Policies Embodied In Rule 23.

Rule 23 attempts to strike a balance between systemic benefits and individual costs, authorizing certification only where the balance is favorable. It empowers district courts to ensure that the Rule's twin goals—facilitating efficient class relief and protecting the parties and absent class members—are properly advanced, and authorizes (discretionary) appellate review of certification orders to promote certainty and uniformity of decision.

By failing to address arguments supposedly bearing on the "merits" of Plaintiffs' claims, blithely accepting Plaintiffs' "assur[ances]" that they can prove damages on a class-wide basis, and declining to engage in any meaningful evaluation of expert testimony at the certification stage, the Third Circuit failed to discharge its reviewing obligation, and its decision signals an approach to class certification that neither effectively furthers the efficiency goals of Rule 23 nor adequately protects class-action defendants and absent plaintiffs from undue costs.

A. Rule 23(b)(3) was promulgated to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966) ("1966 Advisory Committee's Note"). The rule expressly requires courts to find predominance "as a condition" of certification, because "[i]t is only where this predominance exists that economies can be achieved by means of the class-action device." *Id.* at 103.

By disclaiming any authority to resolve issues critical to determining whether proposed class-wide proof is viable, however, and by declining to adjudge the relevance, helpfulness, or reliability of evidence introduced to prove those issues, the Third Circuit's approach provides no assurances that class claims certified under Rule 23(b)(3) will actually be provable by (predominately) common evidence. Rule 23 interposes district courts as gatekeepers precisely to forestall the burdens of class-action defense when those burdens are not justified by real systemic benefits. *See, e.g.*, 1966 Advisory Committee's Note, 39 F.R.D.

at 103; *see also*, *e.g.*, *Amchem*, 521 U.S. at 615 (requiring a "close look" before class actions are certified to ensure that the rule's "efficiency" and "uniformity" goals are advanced without any undue burden on "procedural fairness" or the "individual autonomy" of plaintiffs "who might prefer to go it alone"). Yet because the Third Circuit's approach is inadequate to distinguish those cases *actually* promising systemic benefits from those without any redeeming value, it is an abdication of judicial responsibility at the class certification stage.

And that defect is especially significant because "[a] district court's ruling on the certification issue is often the most significant decision rendered" in class-action proceedings. *Deposit Guar. Nat'l Bank*, 445 U.S. at 339. Given the potential damages at issue, "class certification creates insurmountable pressure on defendants to settle," regardless of the merits, "whereas individual trials would not." *Castano*, 84 F.3d at 746; *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 260 tbl. 4 (2010) (average settlement over $100 million in certified federal class actions). As the district court acknowledged below, class certification is thus "'often the defining moment in class actions (for it may sound the death knell of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).'" Pet. App. 92a-93a (quoting *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009)) (internal quotation marks omitted).

The importance of class certification is particularly pronounced in antitrust litigation. "Because of the complexity of the issues and the breadth of the

discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.'" 6 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 26.46[1] (3d ed. 2011); *see also Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-59 (2007) (collecting citations). "The risks associated with antitrust class actions" therefore "dictate that most cases will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Competition by Narrowing* Noerr*: A Reply*, 18 Antitrust 77, 78 (2003); *see also* Eisenberg & Miller, *supra*, at 262 tbl. 5 (average settlement over $160 million in certified antitrust class actions).

Class certification has real costs for plaintiffs as well. Absent plaintiffs who do not opt out of the class will be bound by the judgment and forfeit any right to proceed individually if the named plaintiffs lose. And absent plaintiffs "who might prefer to go it alone" are similarly deprived of "individual autonomy." *Amchem*, 521 U.S. at 615.

The importance of the certification inquiry to both plaintiffs and defendants emphasizes the importance of getting that inquiry *right*. But that is a decidedly unlikely outcome on the Third Circuit's approach, which essentially accepts—in so many words—the plaintiff's "assurance . . . that it intends or plans to meet the requirements" of Rule 23. *Hydrogen Peroxide*, 552 F.3d at 318; *compare* Pet. App. 46a.

B. The Third Circuit believed that permitting "merits" inquiries at the class certification stage "would turn class certification into a trial" and "would run 'dangerously close to stepping on the toes

of the Seventh Amendment.'" Opp. 10 (quoting Pet. App. 33a-34a). But *Dukes* squarely held that plaintiffs must prove any contention bearing on the propriety of certification, even if "they will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." 131 S. Ct. at 2552 n.6. This requirement does not impinge on any Seventh Amendment rights because "any findings for the purpose of class certification 'do not bind the fact-finder on the merits.'" Pet. App. 14a (quoting *Hydrogen Peroxide*, 552 F.3d at 318); *see also IPO Sec. Litig.*, 471 F.3d at 41. No claim is being decided or tried at the certification stage; the denial of a certification motion leaves completely undisturbed the rights of the class members to pursue their individual claims, including (where appropriate) by trying those claims to a jury.

The Third Circuit also claimed that its holding was consistent with the purportedly "unifor[m]" concern about "converting certification decisions into mini trials" that had been expressed before *Dukes* by "recent scholarship." Pet. App. 34a n.10. In contrast to the authors of the articles identified by the court below, most of whom were members of the plaintiffs' class-action bar, other scholars specializing in class actions had praised, as a "welcome step forward," the broad consensus among lower-court decisions holding (consistent with the later opinion in *Dukes*) that *Eisen* does not preclude the "weighing of competing expert submissions." Nagareda, *supra*, at 111, 113; *see also*, *e.g.*, Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 Geo. Wash. L. Rev. 324, 372 (2011) ("the recent shift toward merits scrutiny at the class certification stage is a positive development"). In any event, the "scholarship" cited by the

Third Circuit cannot overrule *Dukes*—even if the authors disagree with it.

This purported concern about mini-trials is particularly misplaced in the context of determining whether expert evidence is sufficiently helpful and reliable to satisfy Rule 702 and *Daubert*. That issue is often (indeed usually) litigated before trial in the context of a motion *in limine* or similar pretrial proceeding, and requires (at most) an evidentiary hearing—*of precisely the sort that the district court held in this case*. The questions might not always be easy—although here they are—but the need to resolve "[t]ough questions" (*West*, 282 F.3d at 938) is no basis for courts to ignore the "rigorous analysis" required by Rule 23 and this Court's precedents, *Falcon*, 457 U.S. at 161.

C. This Court has insisted on faithful application of procedural rules even where doing so would require additional effort by district courts in assessing whether a pleaded cause of action is "plausible" or whether a disputed factual issue is "genuine." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1950 (2009); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). So, too, the district court must decide whether the "party seeking class certification" has "affirmatively demonstrate[d] his compliance" with Rule 23, because "Rule 23 does not set forth a mere pleading standard." *Dukes*, 131 S. Ct. at 2551.

But the Third Circuit's approach would essentially return to the days when a bare complaint could suffice to satisfy the proponent's burden, permitting certification for any plaintiff who can hire an expert to submit a report, no matter how flawed, at the certification stage. *See* Nagareda, *supra*, at 125-26. If a

bare complaint does not suffice, then an unexamined expert report similarly must be insufficient. And the report of Dr. McClave in this case surely does not, and cannot, suffice to carry Plaintiffs' evidentiary burden. Rule 23 requires "proof" and "findings," *Dukes*, 131 S. Ct. at 2552, 2558-59, not the "assur[ances]" accepted by the Third Circuit, Pet App. 46a. The decision below cannot stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

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August 17, 2012

APPENDIX

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corre-

sponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, is-

sues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present

claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new oppor-

tunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

RESPONDENT'S BRIEF

No. 11-864

In The Supreme Court of the United States

COMCAST CORPORATION, COMCAST HOLDINGS CORPORATION, COMCAST CABLE COMMUNICATIONS, INC., COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., and COMCAST CABLE HOLDINGS, LLC,

Petitioners,

CAROLINE BEHREND, STANFORD GLABERSON, JOAN EVANCHUK-KIND, and ERIC BRISLAWN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

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BRIEF FOR RESPONDENTS

Respondents Caroline Behrend, Stanford Glaberson, Joan Evanchuk-Kind, and Eric Brislawn respectfully submit that the Court should dismiss the writ as improvidently granted or, if it reaches the Question Presented in spite of the parties' pending settlement and Comcast's failure to preserve its claims of error, affirm the judgment of the court of appeals.

STATEMENT OF THE CASE

This appeal involves an attempt by Comcast to avoid a settlement agreement that the parties signed two weeks before the Court granted review and that is presently before the district court on a motion to enforce. The agreement settles a case asserting collusion and abuse of market power claims that Respondents brought in 2003 under the Sherman Act to remedy the anticompetitive conduct that gave rise to Comcast's regional dominance in wireline cable services.

The complaint alleges that, starting in 1998, Comcast violated section 1 of the Sherman Act by agreeing with Time Warner and other cable operators to allocate multi-channel video customers in the Philadelphia area to Comcast[1] and that, during the

[1] *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (per curiam) (holding agreement between former competitors not to compete in Georgia violated section 1); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (striking down under section 1

(Continued on following page)

same time period, Comcast violated section 2 of the Sherman Act by monopolizing and attempting to monopolize the Philadelphia market.

The parties do not dispute that Comcast became the dominant provider of multichannel video programming distribution ("MVPD") services in the Philadelphia designated marketing area ("DMA")[2] by entering into a series of contracts with competing cable providers. Pet. App. 97a-99a; J.A. 727a-40a. In some of the contracts, Comcast "swapped" cable systems it owned in areas outside the Philadelphia DMA for systems within it. In others, Comcast bought entire companies and, with them, the cable systems they had operated inside the Philadelphia DMA. Pet. App. 97a-99a; J.A. 727a-31a.

The swaps and acquisitions increased Comcast's share of subscribers in the Philadelphia DMA from 23.9 percent in 1998 to 77.8 percent by 2002. Pet. App. 108a. The deals also raised the Herfindahl-Hirschman Index ("HHI") for the Philadelphia DMA from 1,833 in 1998 to between 6,148 and 6,178 in 2002. *Id.* The HHI ranges from zero to 10,000, and

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agreement not to compete in territories where parties had never competed before).

[2] The Philadelphia DMA covers 18 counties in Delaware, New Jersey, and Pennsylvania. The class definition excludes the two counties in which Comcast does not provide cable services.

federal antitrust agencies consider an HHI above 2,500 to indicate "Highly Concentrated Markets".[3]

The departures of non-Comcast MVPD operators ended any competitive threat they posed to Comcast in the DMA as potential overbuilders of Comcast's own systems.

The swaps and acquisitions, which Respondents challenge as unlawful restraints of trade under section 1 and as illegal monopolization and attempt to monopolize under section 2, increased Comcast's geographic footprint in the Philadelphia DMA and created a Comcast "cluster". The growth of the Comcast cluster in turn decreased the availability of desirable potential points of entry for overbuilders and increased the economic incentive of Comcast to hinder overbuilding. Pet. App. 123a-39a. It also put systems that once belonged to smaller cable operators into the hands of a large multi-system operator ("MSO"). Pet. App. 101a.

Because the economics of overbuilding made the process less expensive and risky if the overbuilder could start from a location near its existing infrastructure, because ownership of systems by MSOs and clustering increase prices, and because owning contiguous systems enhances the incumbent's ability and incentive to prevent or limit overbuilding, the

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[3] U.S. Dep't of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines* § 5.3 & n.9 (2010); *see* Pet. App. 108a n.12.

swaps and acquisitions had the effect of deterring overbuilding while raising subscribers' prices to supra-competitive levels. Pet. App. 123a-46a.

Government studies and academic research support the conclusion that clustering and ownership of systems by MSOs discourage overbuilding and lead to higher prices for cable. Pet. App. 123a-36a.

RCN, an overbuilder, planned to overbuild five of the counties in the Philadelphia DMA. Pet. App. 82a (Jordan, J.). But for Comcast's anticompetitive conduct, RCN would likely have continued overbuilding beyond the original five counties. *Id.* But in 2001, RCN withdrew from its efforts to overbuild in Philadelphia.

In the district court, U.S. Senior District Judge John R. Padova rejected Comcast's multiple attacks on the pleadings. D.E. 155, 188 & 220. After extensive motion practice and appeals regarding Comcast's attempt to compel arbitration, the parties waived any right to arbitrate and stipulated that this case and cases relating to Comcast's similar conduct in the Boston area would proceed before Judge Padova. D.E. 244.

In May 2007, Judge Padova issued an order certifying a class of cable subscribers from the Philadelphia area to assert antitrust claims against Comcast. D.E. 195. Comcast sought leave to appeal under Federal Rule of Civil Procedure 23(f), claiming errors

in Judge Padova's class certification order and complaining of "hydraulic pressure" to settle.[4] The Court of Appeals for the Third Circuit denied Comcast's Rule 23(f) petition on June 29, 2007. D.E. 210.[5]

Soon after the Third Circuit decided *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), Comcast sought to apply *Hydrogen Peroxide* to decertify the Philadelphia and Chicago classes. D.E. 317. After briefing and argument, the district court treated Comcast's motion as a "Motion for Reconsideration" of its May 2, 2007 class certification order and granted it in part, ordering new briefing to address the requirements of *Hydrogen Peroxide*. D.E. 326. "Comcast effectively conceded that there was predominance with respect to the element of an antitrust violation, stipulating that it was contesting only 'the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages.'" Pet. App. 54a (Jordan, J.). At Comcast's request, the district court set the matter for a hearing. D.E. 379.

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[4] The fact that for five years after the district court certified the Philadelphia class Comcast chose not to pursue settlement illustrates the unlikelihood that certification in itself exerts inordinate pressure on defendants to settle.

[5] Judge Padova later certified a class of cable subscribers from the Chicago area to bring similar claims against Comcast. D.E. 231. Judge Padova stayed the Chicago class's claims, and the Philadelphia class began merits discovery. D.E. 244.

The evidentiary hearing went forward over four days on October 13-15 and 26, 2009. D.E. 407, 409, 411 & 423. The district court permitted the parties to present, and it carefully considered, 32 expert reports relating both to class certification and to merits issues, a great many documents, and excerpts from the depositions of more than a dozen witnesses. *See, e.g.*, D.E. 383-86 & 397-98. The district court also took live testimony from fact and expert witnesses, with each side cross-examining the other's witnesses. J.A. 68a-710a. And Judge Padova himself closely examined the witnesses. *E.g.*, J.A. 100a-01a, 118a-19a, 134a-35a & 415a-21a.

Comcast did not object to the admissibility of any of the expert testimony or reports that Respondents presented in connection with the hearing. *E.g.*, J.A. 72a, 103a, 150a, 346a, 719a, 720a, 816a-50a, 1104a-48a, 1202a-66a & 1304a-497a. Nor did Comcast raise any challenge to the qualifications of Respondents' experts under Rule 702 of the Federal Rules of Evidence or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 469 (1993). R. 83a ("No objection for this hearing, your Honor.") (as to Dr. James McClave); R. 344a (as to Dr. Michael Williams). Comcast instead took the position that the preponderance of the evidence did not support a finding of predominance of the common issues of (1) antitrust impact and (2) methodology of damages. D.E. 412 at 8 ("Plaintiffs have not met their burden of showing that antitrust impact is capable of being proven at trial by proof common to

the class, or that a reliable methodology exists for proving damages on a classwide basis.").

The evidence that Respondents and Comcast offered – and that Judge Padova admitted without objection by Comcast – included extensive proof that, in the words of the Question Presented, "the case is susceptible to awarding damages on a class-wide basis." Dr. Michael Williams, an economist, testified that, in his opinion, four "non-exclusive mechanisms" had "cause[d] the high prices that we see in the Philadelphia DMA" (J.A. 403a):

- "the withholding of Comcast SportsNet Philadelphia from the satellite providers" and the resulting reduction in "DBS penetration rates throughout the Philadelphia DMA and resulting in Comcast increasing its rates throughout the Philadelphia DMA." J.A. 403a.
- "the connection between increased clustering and decreased likelihood or probability of over-building" and the "relationship between clustering and high prices". J.A. 404a.
- the effect of "clustering on Comcast's bargaining power . . . that provides a powerful incentive and ability for Comcast to increase its rates". J.A. 404a-05a.
- reduction in "benchmark competition". J.A. 406a.

Dr. James McClave, a statistician and econometrician,[6] "provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis." J.A. 35a; *see* J.A. 131a n.24 ("It is undisputed by the experts that multiple regression analysis is an acceptable and widely recognized statistical tool for measuring antitrust impact."). "His econometric analysis demonstrated that the alleged antitrust impact was class-wide, because the prices were elevated above competitive levels across all class members and for the entire time period." J.A. 35a. "For his methods, Dr. McClave constructed 'but-for' prices against which to compare the prices Comcast charged in the Philadelphia DMA." *Id.* "To construct the 'but-for' prices, he first selected comparable 'benchmark' counties around the country by applying two 'screens' to determine whether the counties represented a level of competition similar to what Comcast would have faced in the Philadelphia market absent its alleged anticompetitive conduct." J.A. 35a-36a.

Comcast questioned the benchmarks that Dr. McClave chose on the ground that "your but-for world does not necessarily resemble what would have happened" in the Philadelphia DMA if Comcast had not engaged in anticompetitive conduct. J.A. 261a. Dr. McClave consistently answered that "[i]n terms of price it does." *Id.*; *see, e.g.*, J.A. 99a (stating that he

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[6] J.A. 68a-83a (describing Dr. McClave's credentials).

chose screens to simulate "areas in which there might be, if plaintiffs are right, relatively more competition than there is in Philadelphia"); J.A. 208a ("The question is what would the prices have been in Philadelphia absent the anti-competitive behavior.").

Dr. McClave further explained why, when using a multiple regression analysis, benchmark areas need not "look like" the area of observation (in this case the Philadelphia DMA):

> Q. Now, in order to have a reliable and appropriate estimate of damages, using the methodology that you use, does [sic] the benchmark areas and the areas of observation, need to be identical as to those characteristics?
>
> A. No, that's what a multiple regression analysis is.
>
> Q. If, in fact, the benchmark areas and the areas of observation were identical and the only thing that was different was the collusion and the prices, if they were identical, would you need multiple regression?
>
> A. No. You had two identical areas, one that had collusion and one that didn't, you could just compare the prices.
>
> Q. That's all you –
>
> A. You wouldn't need multiple regression that makes adjustment for this.

> Q. What are these adjustment that are being accounted for on your factors on the right-hands [sic] side of the equal sign? And also, the stuff that is accounted for in the way you define our benchmark area? What are those things doing?
>
> A. They are adjusting for differences between the benchmark and Philadelphia.
>
> Q. Is that the purpose of multiple regression?
>
> A. Absolutely.

J.A. 329a.

After the four-day trial, Judge Padova issued to the parties a series of questions touching on many aspects of the antitrust impact and methodology of damages issues. One of the questions asked "how do we interpret Dr. McClave's damages model if, as we anticipated would occur, we credited at least one but not all of Dr. Williams' four bases for antitrust impact?" J.A. 186.

On November 16, 2009, Judge Padova heard argument to address those questions. D.E. 428.

On January 7, 2010, Judge Padova recertified the Philadelphia class. D.E. 431. He stated that, "[h]aving reviewed Dr. McClave's methodology more closely, we are convinced that our decision not to credit Williams' DBS foreclosure theory of antitrust impact does not impeach Dr. McClave's damages model." Pet.

App. 186a. Judge Padova added that Dr. McClave's "selection of the DBS screen to serve this purpose [of isolating the effect of the anticompetitive conduct on price] is entirely unrelated to Dr. Williams' DBS foreclosure theory." Pet. App. 187a.

He also concluded:

> The experts' opinions raise substantial issues of fact and credibility that we are required to resolve to decide the pending motion. Having rigorously analyzed the expert reports, as well as the testimony presented by the parties during a four-day evidentiary hearing, we conclude that the Class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis.

Pet. App. 91a (citing *Hydrogen Peroxide*, 552 F.3d at 316).

In its memorandum recertifying the Class, the district court articulated the standards governing the class certification decision, including that:

- "[c]lass certification is only appropriate 'if the trial court is satisfied, after a rigorous analysis,' that each requirement of Rule 23 has been met" (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982));

- "rigorous analysis" requires "'a thorough examination of the factual and legal allegations'" and "the resolution of all legal or factual disputes relevant to Rule 23 by a preponderance of the evidence" (citing *Hydrogen Peroxide*, 552 F.3d at 316);
- "[a]s with other matters relating to Rule 23 requirements, '[e]xpert opinion . . . calls for rigorous analysis'" (citing *Hydrogen Peroxide*, 552 F.3d at 323, 325);
- "a rigorous analysis may require the district court to weigh conflicting expert testimony at the certification stage and determine whether an expert's opinion is persuasive or unpersuasive" (citing *Hydrogen Peroxide*, 552 F.3d at 323, 324); and
- "[t]he court must resolve expert disputes to the extent necessary to determine whether a Rule 23 requirement has been satisfied" (citing *Hydrogen Peroxide*, 552 F.3d at 324).

Pet. App. 92a-96a.

The district court's Amended Order of January 13, 2010 "reaffirm[ed] and hereby incorporate[d]" its findings "that the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy had been satisfied by the Class and that the Class satisfied the Rule 23(b)(3) requirement of superiority." Pet. App. 190a. But the Amended Order did narrow the scope of the class's antitrust impact proof. It provided

that "[p]roof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." Pet. App. 192a-93a.

On appeal, Comcast did not contend that Judge Padova erred in admitting the expert opinions of Dr. McClave under *Daubert*. Pet. App. 43a n.13 (noting that "'in neither the District Court nor before us' did Comcast raise this issue") (quoting 66a n.18 (Jordan, J., dissenting)). It instead argued that Judge Padova clearly erred or abused his discretion. Pet. App. 66a n.18. Nor did Comcast complain that Dr. McClave's model used an "Overbuilt Counties Screen". Pet. App. 47a n.15 (pointing out that "the Concurrence-Dissent . . . raises multiple arguments against Dr. McClave's damages model not addressed by Comcast's experts at the District Court level nor advanced by Comcast on appeal"); Pet. App. 73a n.23 ("The Majority notes that this particular problem with Dr. McClave's damages theory was not identified by Comcast, but we ought note [sic] overlook significant problems with the class certification simply because they are ones we have identified rather than ones to which our attention has been directed.") (Jordan, J., dissenting).

The court of appeals affirmed the recertification order on August 23, 2011. Applying *Hydrogen Peroxide*, the majority explained that to certify a class the "district court must conduct a 'rigorous analysis' of the evidence and arguments in making the class certification decision." Pet. App. 13a. "The analysis

requires 'a thorough examination of the factual and legal allegations' and 'may include a preliminary inquiry into the merits.'" *Id.* (quoting *Hydrogen Peroxide*, 552 F.3d at 317).

The court of appeals noted that Respondents "bear the burden of establishing each element of Rule 23 by a preponderance of the evidence." Pet. App. 14a. For Rule 23(b)(3), the majority explained, Respondents needed to prove that the class qualifies as "sufficiently cohesive to warrant adjudication by representation." Pet. App. 15a (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

All members of the court of appeals panel agreed that Judge Padova had properly found that class plaintiffs could prove antitrust impact on all class members using evidence common to the class. Pet. App. 27a-34a & 56a-64a.

The majority also held that Judge Padova did not clearly err or abuse his discretion in ruling that, through the extensive expert testimony of Dr. McClave, plaintiffs had "provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis." Pet. App. 35a. The majority noted that "Comcast does not contest that the Court performed the 'rigorous analysis' required by *Hydrogen Peroxide*." *Id.* Even if the majority had overruled the district court's findings regarding Dr. McClave's methodology, the majority noted that "only the final amount of estimated damages would change," *not* the fact that plaintiffs could

prove damages through common proof on a class-wide basis. Pet. App. 48a-49a.

The majority rejected Comcast's abuse of discretion and clearly erroneous attacks, which Comcast now recasts as admissibility issues. Comcast's main complaint in this Court – a complaint that adopts an argument "against Dr. McClave's damages model not addressed by Comcast's experts at the District Court level nor advanced by Comcast on appeal", Pet. App. 47a n.15 – prompted the majority to respond:

> This concern misses the central theory of Plaintiffs' case: by deterring the entry of overbuilders through clustering, Comcast allegedly maintained higher prices across the *entire market area*. Dr. McClave's damages model appropriately reflected a "but-for" world by accounting for overbuilding only in the five counties where RCN attempted to overbuild, and his resulting calculations showed that – taking the limited actual overbuilding into account – "the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination."

Id. (emphasis in original).[7]

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[7] In a footnote, the majority also pointed out that Comcast had twice forfeited any *Daubert* complaint by failing to raise it both in the district court and on appeal. Pet. App. 43a n.13. The majority went on, in dicta, to construe the Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), "to

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Comcast filed a petition for writ of certiorari in this Court. The petition asked "whether a district court may certify a class without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification". Cert. Pet. at i. Neither in the petition nor in its reply brief did Comcast mention *Daubert* or raise any question of admissibility.

By early 2012, the parties completed briefing on Comcast's motion for summary judgment and presented oral argument on the motion to Judge Padova. The district court issued its opinion granting the motion in part and denying it in part on April 12, 2012. D.E. 475. In summary, Judge Padova sustained Respondents' "section 1 rule of reason claim, based upon the theory that Comcast's creation of the Philadelphia cluster through its acquisition of competing cable companies and its swapping of cable assets constituted a horizontal allocation of markets" and the "section 2 monopolization claim . . . and attempted monopolization claim, which contend that Comcast acted with predation in creating its anti-RCN targeted discounts". J.A. 812a-13a.

On May 8, 2012, Dr. McClave, at the district court's invitation, filed a supplemental report on damages. Dr. McClave there pointed out, contrary to

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require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage." *Id.*

the conclusion Judge Jordan reached (on a point Comcast did not raise), that he did not "assume[ ] that elevated prices resulting from reduced overbuilding would be present in only five of the eighteen Philadelphia counties" Pet. App. 72a (Jordan, J.), and concluded:

> The damage percentages vary by year and by county; in general, they are higher for the five counties that RCN indicated it initially planned to overbuild than in the other 11 counties in the DMA. This results not from economic theory, but from the effect on price [that] overbuilding actually had in the benchmark markets. While the damage estimates are lower in the non-overbuilt counties, they are still positive, substantial, and statistically significant. This is consistent with Class Plaintiffs' allegations that Comcast's clustering behavior led to the challenged anticompetitive behavior (horizontal market allocation and/or deterring overbuilding, including RCN's overbuilding plans), which in turn led to supracompetitive prices throughout the Philadelphia DMA.

D.E. 512 Ex. 1 at 9.

The supplemental report also provided an "alternative estimate [that] involves the effect of removing the DBS screen in defining the competitive benchmark." D.E. 512 Ex. 1 at 10. Dr. McClave said:

> If the jury were to disagree with me (and Judge Padova and the majority opinion in the Third Circuit) about using the DBS

> screen as a means to locate competitive markets, then my damages methodology can still be utilized. The effect of expanding the benchmark by dropping the DBS screen is to reduce the damage estimate to $548 million. The reduction in damages is attributable to the inclusion of less competitive markets in the benchmark after the DBS screen is removed, thereby increasing but-for prices and lowering damages. However, damages remain substantial and statistically significant.

Id.

On May 9, 2012, Judge Padova specially set the case for trial on September 5, 2012. D.E. 500.

On June 8, 2012, Comcast for the first time moved to exclude Dr. McClave's opinions under *Daubert*. D.E. 511.

On June 11, 2012, after a day-long mediation under the supervision of the district court, counsel for class plaintiffs and Comcast signed an Outline of Proposed Settlement Key Terms. The parties confirmed the agreement on June 12 and by letter of June 13 asked Judge Padova to remove the case from the September 5 trial docket in light of the pending settlement. D.E. 515.

This Court granted Comcast's petition for writ of certiorari on June 25, 2012. Two days later, Comcast informed Respondents that it would not proceed to finalize the settlement. On June 29, Respondents

filed a motion to enforce the settlement. D.E. 514 & 515. Comcast opposed the motion, D.E. 524, and Respondents filed a reply in support of the motion, D.E. 528. On July 31, Judge Padova vacated pending deadlines, including the trial setting. D.E. 531. Judge Padova held a hearing on the motion to enforce the settlement on August 21. D.E. 540. The motion remains pending in the district court.

SUMMARY OF ARGUMENT

The parties' pending settlement supports dismissal of the writ as improvidently granted. Dismissing the writ would further the policy of encouraging settlements. The settlement also materially changes the nature of the Question Presented in that in the context of a settlement class concerns about the ability of the class to prove their claims on a class-wide basis at trial on the merits become less important.

Comcast failed to raise the admissibility issues it now advocates in this Court, rendering the plain error test the appropriate standard of review in this case. Applying the plain error standard would substantially alter the Court's analysis of the Question Presented such that an answer to the Question Presented would give lower courts scant guidance on addressing admissibility issues in the great majority of cases in which parties opposing admission of evidence for purposes of a class certification motion will have preserved objections to admission of the

evidence. Comcast also failed to show plain error under current law, which does not plainly or obviously require admissible evidence. Comcast's procedural defaults support dismissal of the writ as improvidently granted or, alternatively, summary affirmance.

In the event the Court reaches the merits despite the parties' pending settlement and Comcast's failure to preserve its claims of error, Respondents answer the Question Presented with a narrow and cautious "yes" that emphasizes the abstract and hypothetical nature of the question in this case and the importance of according district courts broad discretion in how they handle admissibility issues, including under *Daubert*, in connection with a motion for class certification.

That answer would not affect the outcome of this appeal. The evidence that the district court admitted and credited without objection by Comcast would meet any applicable test for admission and validly show, on a class-wide basis, that all class members suffered measurable damages. The admissibility arguments that Comcast has for the first time adopted in its brief on the merits before this Court suffer from logical flaws and lapses that would have become obvious in the district court had Comcast made the arguments there in a timely fashion. The completely new complaint that the Respondents' damages model assumes only some class members suffered damages as a result of overbuilding simply misreads the evidence. The argument that the damages model

assumes that lawful conduct caused some of the damages also does not withstand scrutiny. The model in fact shows that Comcast's anticompetitive behavior produced all of the class-wide damages. And another totally new argument posits, wrongly, that calculating damages on a class-wide basis makes individual issues predominate and certification under Rule 23(b)(3) inappropriate.

ARGUMENT

I. THE PARTIES' SETTLEMENT SUPPORTS DISMISSAL OF THE WRIT AS IMPROVIDENTLY GRANTED

The settlement of a case generally moots it. *E.g., U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (addressing "mootness by reason of settlement" and holding it "does not justify vacatur of a judgment under review"). Here, the parties settled the entire case, including any dispute over recertification of the Philadelphia class, before the Court granted Comcast's petition for writ of certiorari.

Although Comcast now opposes it, the pending settlement counsels restraint here. As the Court has noted, "public policy wisely encourages settlements". *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994); *see Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 407 (1992) ("To the extent that litigants are allowed to avoid their solemn commitments, the motivation for particular settlements will be compromised,

and the reliability of the entire process will suffer.") (Stevens, J., dissenting). The policy favoring voluntary settlement agreements "'is especially strong in class actions and other complex cases . . . because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by federal courts.'" *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (en banc) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010)). Allowing the settlement to take its course in the district court will further the goal of fostering settlements and holding parties to their bargains.

The pending settlement at all events materially alters the question before the Court. "Settlement is relevant to a class certification." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). In the context of a settlement, "a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R. Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Id.* at 620. The Second Circuit recently held that settlement obviates concerns about a class's ability to prove an element of its claim on a class-wide basis. *See In re Am. Int'l Group, Inc. Sec. Litig.*, 689 F.3d 229, 241 (2d Cir. 2012) (holding that district court erred in ruling that settlement class, unlike non-settlement class, "must satisfy the fraud-on-the-market presumption in order to demonstrate predominance"); *see also Sullivan v. DB Investments*, 667 F.3d at 303-04 (holding that under *Amchem* problems with varying state treatments of indirect purchaser

claims did not prevent certification of settlement class). In similar circumstances, the Court has for prudential reasons dismissed writs as improvidently granted. *See TICOR Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (per curiam) (dismissing writ in class action where, "as matters have developed it is not clear that our resolution of the constitutional question will make any difference even to these litigants", who "had reached a settlement designed to moot the petition, which now awaits the approval of the district court"); *Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 224-25 (1970) (per curiam) ("While the changed circumstances do not necessarily make the controversy moot, they are such that, if known at the time the petition for a writ of certiorari was acted upon, we would not have granted it.").

The Court should dismiss the writ as improvidently granted.

II. IN THE COURTS BELOW, COMCAST DID NOT MAKE THE ARGUMENTS IT NOW ADVOCATES, AND THEREFORE THE COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED OR SUMMARILY AFFIRM THE JUDGMENT OF THE COURT OF APPEALS

A. Comcast's Forfeiture of any Admissibility (and *Daubert*) Challenges to Dr. McClave's Expert Reports and Testimony Alters the Standard of Review for the Question Presented

Comcast chose not to object to admission of Dr. McClave's expert reports and testimony on any ground – including for lack of relevance under Rule 402 and for failure to comply with the test for expert testimony under Rule 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The lack of a timely objection normally forfeits any complaint on appeal, as this Court deems a party that fails to preserve error to have "*forfeited* the claim of error". *Puckett v. United States*, 556 U.S. 129, 138 (2009) (applying plain error test to failure to object to breach of plea agreement) (emphasis in original).

Rule 103 of the Federal Rules of Evidence demands, as a prerequisite to complaint on appeal, timely objection to the evidence.[8] And lower courts

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[8] Rule 103 provides, in relevant part:

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence

(Continued on following page)

recognize the Court's requirement that parties preserve error under Rule 103 and treat "[f]ailure to raise a *Daubert* challenge at trial" as a forfeiture of "the right to raise objections to the substance of expert testimony post-trial." *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1113 (9th Cir. 2012) (rejecting challenge to expert's testimony on damages); *see Macsenti v. Becker*, 237 F.3d 1223, 1233-34 (10th Cir. 2001) (holding that *Daubert* objection to expert testimony at close of trial evidence came too late to preserve error); *C.B. Fleet Co., Inc. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 437 (4th Cir. 1997) (rejecting post-trial *Daubert* objection "under the guise of a challenge to the substantive sufficiency of this evidence"); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 (9th Cir. 1996) (declining to entertain on appeal *Daubert* challenge that party presented "in the guise of an insufficiency-of-the-evidence argument").

The failure to object to admission of evidence calls for application of a standard different from the normal abuse of discretion test that governs under

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only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context

Fed. R. Evid. 103(a)(1).

Daubert. *See General Electric Co. v. Joiner*, 522 U.S. 136, 141-43 (1997) (holding that abuse of discretion standard applies to review of *Daubert* rulings). Instead, Comcast must show plain error. *See, e.g., Wallace v. McGlothan*, 606 F.3d 410, 421 (7th Cir. 2010) (holding that failure to object that experts' "testimony was unreliable" under *Daubert* "forfeited" the issue, "and we can only review for plain error"); *Goebel v. Denver & Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1089 n.2 (10th Cir. 2000) ("If there is no objection to the expert testimony, the opposing party waives [forfeits] appellate review absent plain error.").

The Court explained the plain error rule in *Puckett v. United States*, 556 U.S. 129, 134 (2009), as follows:

> If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited. "No procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States,* 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944).
>
> If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or

> ordering a new trial) is strictly circumscribed. There is good reason for this; "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *United States v. Padilla,* 415 F.3d 211, 224 (C.A.1 2005) (en banc) (Boudin, C.J., concurring).
>
> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. *Cf. Wainwright v. Sykes,* 433 U.S. 72, 89, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); see also *United States v. Vonn,* 535 U.S. 55, 72, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002).

See, e.g., Kenneth S. Broun, *McCormick on Evidence* § 55 (6th ed. 2010) ("A failure to assert an objection promptly and specifically is a waiver.") (footnote omitted).

"Plain error is a stringently limited standard of review, especially in the civil context, and must result in a miscarriage of justice in order to compel reversal." *Lopez v. Tyson Foods, Inc.*, ___ F.3d ___, 2012 WL 3792545, at *4 (8th Cir. Sept. 4, 2012) (quoting *Schaub v. VonWald*, 638 F.3d 905, 925 (8th Cir. 2011)). To show plain error, Comcast must prove error that "is plain, affects substantial rights, and 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Jimenez v. Wood County, Tex.*, 660 F.3d 841, 845 (5th Cir. 2011) (en banc) (quoting *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009)).

Comcast petitioned for review of the question "whether a district court may certify a class action without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." Cert. Pet. at i. Comcast did not mention *Daubert* or make any complaint about admission of evidence. And, after relisting the case several times, the Court granted review not on the question of "resolving 'merits arguments'" but on one involving the need, or not, for "admissible" proof. That Comcast never raised a complaint in the district court, the court of appeals, or in this Court before the day the Court granted review on a question Comcast never posed should come as no surprise. On appeal, Comcast must live with the consequences of forfeiting arguments in the courts below.

Comcast's forfeiture of *Daubert* and any other admissibility objections to Dr. McClave's testimony – like the parties' pending settlement – materially changes the circumstances from those under which the Court granted review. If Comcast had preserved error, the abuse of discretion standard would apply, both to the decision to recertify, *see Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (noting that "most issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court"), and to rulings on admissibility of Dr. McClave's opinion evidence, *see Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008) ("'A district court is accorded wide discretion in determining the admissibility of evidence under the Federal Rules.'") (quoting *United States v. Abel*, 469 U.S. 45, 54 (1984)). And the material change in the nature of the question before the Court – a question that in any event essentially relates to dicta in the court of appeals decision – would have the effect of guiding lower courts on the appropriate test to apply under Rule 23 to the rare cases in which the complaining party failed to preserve objections to admissibility, under *Daubert* and otherwise. Such "changed circumstances" warrant dismissal of the writ as improvidently granted. *Taggart v. Weinacker's, Inc.*, 397 U.S. at 224 (dismissing writ).

B. Comcast Has Failed to Show Plain Error "Under Current Law"

Comcast's failure to preserve its claim of error in the admission of Dr. McClave's opinion evidence also supports summary affirmance of the court of appeals' judgment. As the Court noted in *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)), the plain error rule treats "plain" as "'synonymous with 'clear' or, equivalently, 'obvious.'" "'At a minimum,' *Olano* concluded, the error must be plain 'under current law.'" *Id.* (quoting *Olano*, 507 U.S. at 734). And in *Johnson* the Court held that "current law" means "by the time of appellate consideration". *Id.* at 468.

But the law on whether Rule 23 requires "admissible" evidence on class-wide damages has not changed in this Court. The Court has never announced the answer to the question it posed in granting Comcast's petition – whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis. Indeed, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011), the Court expressly chose not to decide whether a district court may properly certify a class in the absence of expert evidence admissible under *Daubert*. It would have made little sense for the Court to grant review in this case if it believed it had already resolved the "admissible evidence" question. In the absence of an intervening

change in the law, Comcast fails the first prong of the plain error test. *See Jimenez*, 660 F.3d at 847 & n.10 (rejecting plain error challenge that "does not rise to the level of obviousness" where "there has been no change in controlling law since the time of trial"); *see also United States v. Gaudin*, 515 U.S. 506, 526 & 527 (1995) (Rehnquist, C.J., concurring) (pointing out that "it is certainly subject to dispute whether the error in this case was 'clear under current law'" while noting that "the Government has not argued here that the error in this case was either harmless or not plain" and that the Court "does not review" the court of appeals decision for "plain error"). The Court should therefore summarily affirm the judgment of the court of appeals.

III. IF THE COURT REACHES THE QUESTION PRESENTED NOTWITHSTANDING THE PARTIES' PENDING SETTLEMENT AND COMCAST'S FAILURE TO PRESERVE ERROR, THE DISTRICT COURT'S RECERTIFICATION ORDER EASILY MET EVERY APPLICABLE STANDARD UNDER RULE 23(b)(3)

This case does not provide an appropriate legal posture or factual setting for the Court to give a definitive answer to the Question Presented. As Respondents have shown, Comcast never made – and therefore forfeited – any *Daubert* or other challenge to the admissibility of Respondents' expert evidence on class-wide damages. Thus, unlike the situation in

most class action cases, the plain error standard, rather than the usual abuse of discretion and clearly erroneous tests, governs here. And, despite Comcast's failure to object to admission of Dr. McClave's analysis, Judge Padova adhered faithfully to rigorous requirements that the Third Circuit mandated in *Hydrogen Peroxide* and as a result did not commit error, plain or otherwise, under *Daubert* or any other test, by admitting and crediting Dr. McClave's damages model as a means for establishing damages on a class-wide basis. The unpreserved error and the pending (but disputed) settlement combine with the district court's lack of error to make this case an inapt vehicle for ruling on the Question Presented.

In the event the Court nonetheless reaches the Question Presented in this case, Respondents would answer it as follows.

A. District Courts Need Not Make Final Rulings on Admissibility of Evidence, Including Expert Evidence, to Show that the Case Is Susceptible to Awarding Damages on a Class-Wide Basis Before Granting or Denying Class Certification in Rule 23(b)(3) Cases

Respondents agree, as a general matter, that a district court should resolve evidentiary objections, including under *Daubert*, that the opposing party timely makes, well presents, and properly preserves when the evidence bears critically on an issue the court must decide before granting or denying class

certification, whether or not the evidence or issue also overlaps with the merits. If a court relies on expert testimony as the basis for determining that trial of the merits on a class basis can generate common answers, the competence and reliability of the expert testimony are properly before the court at the time of the certification decision. And if the district court is confronted with a well-presented motion to strike an expert's report as inadmissible on *Daubert* grounds, then that court must resolve whether the report could be admitted even if the subject of the report overlaps with the ultimate merits of the case.[9]

But context matters. At trial, the admissibility of expert evidence may turn not only on *Daubert* issues but also on questions – including relevance, cumulative nature of the evidence, and failure to make timely disclosure – that have nothing to do with class certification. And the *Daubert* question before the court at the class certification stage differs from the one it must answer under *Daubert* at trial. If a party offers expert evidence in order to show (or negate) the feasibility of showing class-wide damages at trial using common proof, the evidence need not prove (or disprove) class-wide damages and instead needs to show only that, more likely than not, class-wide

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[9] That rule fully accords with the district court's analysis, findings, and conclusions, all of which carefully applied the rigorous analysis and factual determinations that *Hydrogen Peroxide* called for.

methods of proving damages will (or will not) be available at trial. In many cases, perhaps most, the best way to make the showing will consist of proving class-wide damages with admissible evidence, whether expert or non-expert. Although not required, this would most of the time put any issues about the availability of class-wide proof at trial to rest. But it is at least conceivable and reasonable to expect that, in many cases, a district court may properly admit expert evidence that complies with *Daubert* but that itself does not directly prove damages on a class-wide basis. That is perhaps what the majority in the court of appeals alluded to when it spoke, in dicta (because of Comcast's failure to preserve its claim of error), of the possibility that evidence may evolve to become admissible at trial.

None of this implies rigidity. The normally deferential review of *Daubert* rulings applies with particular force in the context of pre-trial proceedings like class certification. *See Joiner*, 522 U.S. at 143 (rejecting court of appeals "overly 'stringent' review" of district court's ruling under *Daubert* because "it failed to give the trial court the deference that is the hallmark of abuse-of-discretion review"). The Court in *Joiner* emphasized that the importance of a *Daubert* ruling to the outcome of a case did not justify "a more searching standard of review." *Id.* (discussing ruling on expert testimony in context of an "outcome determinative" setting). And the Seventh Circuit has noted

that "the usual concerns of the rule – keeping unreliable expert testimony from the jury – are not present in such a [non-jury] setting, and our review must take this factor into consideration." *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010) (citing *Attorney Gen'l of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009)). The Eighth Circuit confirmed the premise:

> The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker.

In re Zurn Pex Plumbing Prods. Liability Litig., 644 F.3d 604, 613 (8th Cir. 2011), *cert. pending*, No. 11-740 (U.S.). Other courts of appeals agree. *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 615 F.3d 321, 330 (5th Cir. 2010) (noting that "the importance of the trial court's gatekeeper role is significantly diminished in bench trials, as in this instance, because, there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence") (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)); *United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005) ("Those barriers [to opinion testimony] are even more relaxed in a bench trial situation, where the judge is serving as factfinder and were are not concerned about 'dumping a barrage of questionable scientific

evidence on a jury.'") (quoting *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999)).

Indeed, the Court itself has stressed "that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable" under *Daubert. Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). And applying a lower threshold for consideration of information that appears relevant to a preliminary proceeding happens often at the district court level. *See, e.g., Mullins v. City of New York*, 626 F.3d 47, 51-52 (2d Cir. 2010) ("The admissibility of hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction phase.") (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). A one-size-fits-all approach to class certification would thus conflict with the flexibility that the Court accords to district courts even in the context of trials.

The question of admissibility of evidence to prove damages on a class-wide basis will not arise at all in many class actions. These include cases in which plaintiffs seek purely injunctive relief or declaratory relief on behalf of a class. *See Dukes*, 131 S. Ct. at 2557 ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'") (quoting

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009)). Other examples consist of cases in which a finding of liability automatically entitles class members to minimum statutory damages. *See Principles of the Law of Aggregate Litigation* § 2.03 comment c (discussing "the amenability of statutory damages to ready calculation").

But Comcast never raised the issue of admissibility until after the Court granted review in this case. That default renders the question abstract, hypothetical, and inappropriate for resolution here. And, in any event, as Respondents demonstrate below, an affirmative answer would not have affected the outcome in the trial court or in the court of appeals.

B. Dr. McClave's Expert Reports and Testimony Validly Show That All Class Members Suffered Damages from Comcast's Anticompetitive Clustering Conduct and Preclude a Finding of Plain Error

Comcast must demonstrate that Judge Padova plainly erred in accepting Dr. McClave's methodology

as a plausible way to show damages on a class-wide basis.[10] It has failed to meet its burden.[11]

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[10] The Court has historically required less precision in proof of the *quantum* of damages in antitrust cases than it does in evidence of a violation and a causal connection between the violation and individual injury. As the Court has recognized, "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) The standard for proving the amount of damages is thus less stringent than that required for proving the fact of damage, and after injury and causation have been shown, "'[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931)); *see, e.g.*, ABA Section of Antitrust Law, *Antitrust Law Developments* 782 (7th ed. 2012); Herbert Hovenkamp, *A Primer on Antitrust Damages* 24 (2011) (noting that "[c]omputation of damages often involves more speculation than determining that a particular act is anticompetitive" and that the "Court has responded to these difficulties by setting a relatively high standard for proof of the *fact* of an antitrust violation and resulting injury, but a lower standard for proof of the amount of damages") (available at http://ssrn.com/abstract=1685919) (emphasis in original).

Nor must Respondents negate other possible causes of their damages. As the Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969), "[i]t is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." "[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Bigelow*, 327 U.S. 251, 264-65.

[11] Comcast could not carry its burden under the abuse of discretion test either.

1. Dr. McClave demonstrated that clustering raised prices to supra-competitive levels throughout the Philadelphia DMA

Judge Padova found as a matter of fact "that the McClave model is a common methodology available to measure and quantify damages on a class-wide basis." Pet. App. 187a; *see* Pet. App. 50a ("Plaintiffs have provided a common methodology to measure and quantify damages. The District Court acted within its discretion in so finding.") (footnote omitted). The district court concluded, rightly, that Philadelphia DMA prices reflect the impact of any anticompetitive conduct there and that Dr. McClave's methodology compares those Philadelphia prices to Comcast's own prices in more competitive markets to isolate the effect of the anticompetitive conduct in the Philadelphia DMA.[12] And Dr. McClave has stated consistently that his selection of the benchmark counties does not depend on any one ground for liability and that he used screens to identify proxies for relatively competitive markets. J.A. 99a, 208a & 261a. His use of "relatively competitive markets" as a "yardstick" benchmark in conjunction with standard econometric methodology to compute damages resulting from

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[12] "The task is therefore to construct the but-for plaintiff in a way that justifies an inference that the difference between the plaintiff's but-for and actual experiences is attributable only to the effects of the violation." ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 57 (2d ed. 2010).

Comcast's anticompetitive conduct in the Philadelphia DMA accords with standard econometric practice.[13]

Yet Comcast aims to defeat the finding by raising in this Court a point that it did not assert below – the idea that Dr. McClave's model reflects damages from deterrence of overbuilding in only five of the 16 counties within Comcast's Philadelphia DMA footprint. Br. at 20.[14] The Court normally does not consider an argument that "makes its first appearance here in this Court in the briefs on the merits". *Ohio*

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[13] As Professor Hovenkamp points out about the yardstick method for computing damages:

> The ideal conspiracy for the yardstick approach is a local cartel where a nearby market can be found which has the same basic cost structure. Adjustments must probably be made for differences in taxes and regulatory fees, costs of transportation, and different wage and salary rates. However, if these differences can be isolated and quantified, an expert economist or accountant should be able to produce a 'reconstructed' price that would have prevailed in the cartelized market if it had the same level of competition as exists in the yardstick market.

Herbert Hovenkamp, *A Primer on Antitrust Damages* 31 (2011) (available at http://ssrn.com/abstract=1685919).

[14] Although Comcast does not note its failure to raise the argument before Judge Padova or the court of appeals, it can hardly deny the fact. The originator of the argument, the dissenting judge on the court of appeals panel, conceded "that this particular problem with Dr. McClave's damages theory was not identified by Comcast". Pet. App. 73a n.23 (Jordan, J., dissenting in part).

Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 738 & 739 (1998). The Court should not do it here either. Comcast's failure to raise the issue in the district court deprived Respondents of the ability to answer it – as indeed they did in 2012, after Comcast urged the dissenting judge's point on remand of the case from the court of appeals in the context of an actual *Daubert* motion. *See Ohio Forestry*, 523 U.S. at 739 (explaining that "we cannot consider" new claims that would have changed opposing party's analysis and therefore "are not fairly presented here").

But even if Comcast had timely presented this new argument, it would have failed because – unsurprisingly for an issue the parties did not litigate or even suspect existed – it rests on inaccurate inferences from Dr. McClave's reports. Contrary to Comcast's new argument, Dr. McClave did *not* "assume[ ] that elevated prices from reduced overbuilding could be present only in the five counties 'that RCN indicated it planned to enter", and the model did *not* "identify elevated prices from reduced overbuilding only in those counties." Pet. App. 72a (Jordan, J., dissenting). As Dr. McClave explained after remand, damages in his model "are higher for the five counties that RCN indicated it initially planned to overbuild than in the other 11 counties in the DMA." D.E. 512 Ex. 1 at 9. And he added that, "[w]hile the damages estimates are lower in the non-overbuild counties, they are still positive, substantial, and statistically significant" and are "consistent with Class Plaintiffs' allegations that Comcast's clustering behavior led to

the challenged anticompetitive behavior (horizontal market allocation and/or deterring overbuilding, including RCN's overbuilding plans), which in turn led to supracompetitive prices *throughout the Philadelphia DMA*." *Id.* (emphasis added).

Dr. McClave's post-remand explanation meshes exactly with Dr. Williams's testimony (on how lowering the *likelihood* of overbuilding through clustering affects prices) to Judge Padova in November 2009. As Dr. Williams explained at the time:

> So, the second mechanism [that connects Comcast market power to higher prices in the Philadelphia DMA] is the connection between increased clustering and *decreased likelihood or probability* of over-building. My reports lay out several mechanisms, several models under which this can happen, that are consistent with the economics literature on *relationship between clustering and high prices and demonstrate that the likelihood of over-building falls as the clustering increases.*

J.A. 404a (emphasis added).

Judge Padova plainly understood Dr. McClave's and Dr. Williams's analyses and opinions and found that Comcast's "conduct designed to deter the entry of overbuilders in the Philadelphia DMA" reduced competition not only in "these five counties" but also had antitrust "impact in the entire eighteen county DMA." Pet. App. 144a-45a (rejecting criticisms by Dr. Teece). Comcast's late adoption of a new argument

fails on the merits and under any standard. Judge Padova did not err in finding "that the McClave model is a common methodology available to measure and quantify damages on a class-wide basis." Pet. App. 187a.

2. The district court's exclusion of conduct it deemed non-actionable does not undercut Dr. McClave's conclusion that supra-competitive prices damaged all class members

Judge Padova found that his decision not to credit Dr. Williams's DBS foreclosure theory of antitrust impact "does not impeach Dr. McClave's damage model." Pet. App. 186a. He explained that Dr. McClave's "selection of the DBS screen to serve this purpose is entirely unrelated to Dr. Williams' DBS foreclosure theory." Pet. App. 187a. Judge Padova continued:

> It was merely [Dr. McClave's] method of choosing counties to serve as comparators. ***Any anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of comparison counties.*** Thus, whether or not we accepted all of Dr. Williams' theories of antitrust impact is inapposite to Dr. McClave's method of choosing benchmarks. Because we have determined that the national average DBS penetration rate for Comcast markets is a valid screen, we concluded that the McClave model is a

> common methodology available to measure and quantify damages on a class-wide basis.

Id. (emphasis added). Judge Padova not only addressed the soundness of Dr. McClave's methodology but also specifically found that it passed the test.

The ruling makes sense. Correlation does not equal causation.[15] Dr. McClave's finding of a *correlation* between higher DBS penetration rates and lower prices does not necessarily mean that the former *caused* the latter. As Dr. McClave testified before Judge Padova:

> I was looking for markets in which DBS penetration was relatively high and in which Comcast's share of the market was relatively low. *As proxies for areas in which there might be, if plaintiffs are right, relatively more competition than there is in Philadelphia.*

J.A. 99a (emphasis added). And, when Comcast questioned the benchmarks that Dr. McClave chose on the ground that "your but-for world does not necessarily resemble what would have happened" in the Philadelphia DMA if Comcast had not engaged in anticompetitive conduct, Dr. McClave consistently answered that "[i]n terms of price it does." R. 261; *see, e.g.*, J.A. 208a ("The question is what would the prices have been in Philadelphia absent the anti-competitive

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[15] *E.g., Davis v. Time Warner Cable*, 651 F.3d 664, 677 (7th Cir. 2011) (noting that "correlation is not the equivalent of causation").

behavior."); *id.* ("I think what we're all really looking for is the but-for prices.").

Comcast's contrary position hinges on the false notion that Dr. McClave's model inflexibly depends on the existence of a causal relation between each of Dr. Williams's four "mechanisms" of antitrust impact and the damages he estimated. The inaccuracy of that idea defeats Comcast's position.

Dr. McClave made abundantly clear that his model did not assume or require a causal nexus with Dr. Williams's mechanisms. That position reflects the norm for damages experts. "The damages expert using the but-for approach does not usually testify separately about the causal relation between damages and the harmful act, although variations may occur where there are issues about the directness of the causal link." Federal Judicial Center, *Reference Manual on Scientific Evidence*, "Reference Guide on Estimation of Economic Damages" at 432 (3d ed. 2011). Judge Padova's rejection of three of the "mechanisms" could affect the accuracy of Dr. McClave's model only if Comcast showed, as a matter of law, that a causal connection in fact existed.

Comcast did no such thing. It in fact argued and endeavored to prove *the opposite*. Through its lawyers and experts, Comcast over and over again urged and offered evidence to show that *none* of the three mechanisms had any effect on prices within the Philadelphia DMA – leaving only deterrence of overbuilding to explain the supra-competitive prices in the

Philadelphia DMA. Comcast's Dr. Teece, for example, insisted that "I don't think there's any evidence that that competition [from DBS providers] would have caused Comcast to lower prices anywhere." J.A. 562a. Judge Padova may have credited Comcast's views on the absence of any causal connection between Dr. Williams's three unsuccessful mechanisms and higher prices in the Philadelphia DMA. Pet. App. 122a-23a (noting that "data on DBS penetration rates in Philadelphia" showed "higher than average growth during the class period" and "'indicates that [Comcast] did not anticompetitively foreclose DBS providers from competing effectively in the Philadelphia DMA'") (quoting Dr. Teece); Pet. App. 149a ("Dr. Williams has not provided adequate support for his theory that clustering eliminates benchmarking opportunities"); Pet. App. 161a (stating that "the criticisms of Dr. Williams' bargaining power model are aptly drawn").

Comcast thus plays Hamlet, hoisting itself with its own petard. The trier of fact could accept Comcast's claims that three of the four mechanisms *did not* result in higher prices while at the same time concluding that the remaining mechanism – clustering's deterrence of overbuilding – *did* have that affect and still properly use Dr. McClave's analysis to compute class-wide damages. Comcast itself provided the means for the trier of fact to do so.

The inaccuracy of Comcast's assumption of a causal link between the four mechanisms of Dr. Williams and the damages model of Dr. McClave exposes a deeper flaw in Comcast's position. As Dr. McClave has

explained, even if he removes the DBS screen from his model (and thus inappropriately skews the but-for world in favor of Comcast), class-wide "damages remain substantial and statistically significant" at $548 million. D.E. 512 Ex. 1 at 10. That surely counts as "measurable damages".

Nor would changing or discarding the two screens that Comcast criticizes render Dr. McClave's damages model unsuitable for proving damages on a class-wide basis using common proof. It would merely change the benchmark and thus result in a different damages total. In fact, ***damages remain class-wide and substantial even using the allegedly flawed econometric model, with a nationwide benchmark and average prices, that Comcast's own expert Dr. Chipty proposed*** (after correcting for obvious errors in Dr. Chipty's model, such as including $0 prices and excluding improper components). Pet. App. 177a n.51. Evidence that Comcast's own expert presented thus makes clear that Respondents *can* prove damages on a class-wide basis using common proof. Pet. App. 48a-49a ("Even if we were to overrule as clearly erroneous the District Court's findings on all four contested pieces of Dr. McClave's methodology – i.e., modify both of Dr. McClave's screens, add population density as a variable and incorporate Dr. Chipty's method for calculating discounts – only the final amount of estimated damages would change.").

The cases that Comcast cites do not support its position. All of them involved damages models that,

unlike Dr. McClave's, explicitly tied damages to specific theories. As he testified, Judge Padova found, and the court of appeals majority concluded, "Dr. McClave's damages methodology does not suffer from the defects present in those cases because it constructs a competitive 'but-for' world that includes lawful competition, not a hypothetical one bereft of both lawful and unlawful competition." Pet. App. 47a-48a (distinguishing *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) and *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1352-53 (3d Cir. 1975)).[16]

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[16] *Concord Boat* involved a "Cournot model" that did not take account of the effects of lawful competition by third-parties. *Concord Boat*, 207 F.3d at 1056, 1057 (noting failure of damages model to consider effect of "the recall of [third-party] OMC's Cobra engine and the problems associated with the Volvo/OMC merger" and defendant's loss of market share to competitors). In *Coleman Motors*, sales projections by an independent Dodge dealership included "sales lost as a result of the factory dealerships' lawful competition." *Coleman Motors*, 525 F.2d at 1352. And *MCI Comm'ns v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1165-66 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), dealt with a profit projection that failed to account for price erosion that would have resulted from lawful price competition by AT&T and third parties.

3. The purported need to allocate the class-wide damages award among class members does not cause individual issues to predominate

Comcast seems to suggest that Rule 23(b)(3) and the Rules Enabling Act require Respondents to prove everything – including the amount of individual class members' damages – in one trial. *See* Br. for Pets. at 29 (claiming that allowing "tri[al] as a class action . . . without requiring individual proof of damages" would alter "substantive rights"). Comcast never raised that point before its brief in this Court. Regardless, as the current *Manual for Complex Litigation* instructs, "the court may consider trying common issues first, preserving individual issues for later determination." *Manual for Complex Litigation, Fourth* § 21.5 (2004). "It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." *Messner v. Northshore University Healthsystem*, 669 F.3d 802, 815 (7th Cir. 2012) (citing *Dukes*). The class may properly prove damages on an aggregate basis. *See* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:7 (2002) ("Class proof of damages, either by an aggregate lump sum award to the class as a whole or by application of mechanical formulae or statistical methods to individual class members claims, has received approval in several antitrust cases.") (footnote omitted). And a verdict in this case for Respondents "effectively will dictate that claimants receive retrospective relief in the form of damages and will determine the method for distribution of damages to individual claimants (e.g., based on a

formula keyed to an estimate of the per-unit increase in price attributable to the [unlawful] agreement)." Am. Law Institute, *Principles of the Law of Aggregate Litigation* § 2.03 ill. 12 (2010); *see id.* comment c ("When the nature of the injury suffered by claimants stems from their relationship both to the defendant and to each other through a market mechanism, as in much litigation concerning economic injuries, a finding of liability often will determine that the remedy for any given claimant should take the form of damages to be calculated by reference to some underlying benchmark reflecting the claimant's position within the relevant market."); *In re Pharm. Industry Av. Wholesale Price Litig.*, 582 F.3d 156, 197-99 (1st Cir. 2009) (discussing and affirming aggregate damages award after trial on merits to two classes of drug purchasers under state unfair business practices law).

The cases that Comcast cites involved very different circumstances. The first, *In re Hotel Tel. Charges Litig.*, 500 F.2d 86 (9th Cir. 1974), involved state deceptive trade practices and federal antitrust claims against dozens of hotel chains for imposing excessive surcharges at hundreds of hotels and motels nationwide on millions of customers for their telephone calls. The plaintiffs in that case could not prove even liability on a common basis, much less impact and damages. Much the same problems plagued the plaintiffs in *Windham v. Am. Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), in which the court of appeals affirmed denial of class certification, *see id.* at 66 (noting that district court "referred to the multiplicity of claimants who might be involved, the complexity

of their claims as they would relate to injury and damages, and the highly individualized character the proof of injury and damages would assume, making necessary a mini-trial in all the individual claims, probably with a separate jury").

Nor did Comcast raise the need to allocate damages among class members as a ground for denying class certification in the courts below. It therefore forfeited the point.

CONCLUSION

The Court should dismiss the writ as improvidently granted or, alternatively, affirm the judgment of the court of appeals.

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REPLY BRIEF

No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,

Petitioners,

v.

CAROLINE BEHREND, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Plaintiffs do not defend—or even acknowledge—the basis on which the Third Circuit *actually* rejected Comcast's challenges to their damages model: that "attacks on the merits of the methodology" have "no place in the class certification inquiry." Pet. App. 48a. This is undoubtedly because the Third Circuit's repeated invocation of *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), to dismiss questions bearing on certification as "merits" issues (*see* Pet. App. 13a-14a & n.6, 33a-34a & n.10, 49a-50a) is indefensible, given that this reading of *Eisen* was expressly repudiated in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011). Nor do Plaintiffs try to explain how a lower court could believe that *Dukes*—this Court's most recent pronouncement on the contours of Rule 23—"neither guides nor governs the dispute" about class certification. Pet. App. 41a n.12. Having persuaded the Third Circuit not to address the substance of Comcast's challenges, Plaintiffs now find themselves unable to defend the decision below.

Plaintiffs' attempt to divert this Court's attention from the Third Circuit's errors is apparent in their lead argument, which seeks dismissal on the basis of a purported settlement—a contention that Plaintiffs were forced to withdraw after the district court unequivocally found there was *no* settlement.

Plaintiffs' diversionary efforts also include variations on the theme that the Third Circuit's errors should be overlooked because Comcast supposedly forfeited certain arguments. Comcast, however, has consistently and repeatedly objected to class certification on the ground that Dr. McClave's model cannot provide class-wide evidence of damages because

it does not measure Plaintiffs' only remaining theory of antitrust impact and because it suffers from fatal methodological flaws. The Third Circuit characterized these challenges as "merits" arguments to *avoid* deciding them on class certification—legerdemain that would have been unnecessary had the challenges been forfeited.

When they finally get to the substance of Dr. McClave's damages model, Plaintiffs have precious little to say. That is because the flaws in his methodology and the defects in his conclusions are so fundamental that his model cannot possibly carry Plaintiffs' burden to prove that common issues predominate. Fed. R. Civ. P. 23(b)(3). The certification order should have been reversed by the Third Circuit and should be reversed now by this Court.

I. THE PARTIES HAVE NOT SETTLED.

Plaintiffs' lead argument is based on the factual representation (at 21) that the parties have reached a "settlement" of the "entire case," on the basis of which they ask the Court to dismiss the petition.

This representation, however, is false. The district court rejected Plaintiffs' motion to enforce the purported settlement on the ground that the parties have *not* reached any "binding agreement to settle this dispute." D.E. 543, at 15. The "Term Sheet" signed by the parties—which Plaintiffs erroneously call a "settlement"—was "incomplete in significant respects," *id.* at 11; almost half of the terms were "expressly subject to further discussion and negotiation," *id.* at 12; and thus the parties had "merely an 'agreement to agree' that is not capable of being enforced," *id.* at 12-13.

In light of the district court's decision, Plaintiffs have been forced to concede that their lead argument should be withdrawn and that the non-existent "settlement" provides no basis for dismissing the petition. *See* Sept. 26, 2012 Letter.

II. COMCAST PROPERLY PRESERVED ITS CHALLENGES.

As Comcast demonstrated in its principal brief (at 16-49), the district court's predominance finding was erroneous since Plaintiffs failed to prove that the measurable-damages element of their antitrust claims can be established on a class-wide basis, both because Dr. McClave's model does not measure damages based on the only remaining theory of antitrust impact, and because his methodology is unreliable and papers over significant variations among class members.

Plaintiffs seek to avert review of these defects by arguing that Comcast "forfeited" its challenges to them. Yet Comcast argued in its certiorari petition that Plaintiffs had failed to prove predominance for precisely the same reasons that Comcast now continues to assert as grounds for reversal, *compare* Pet. 21-22 *with* Comcast Br. 21, 44, and Plaintiffs did not even *suggest* in their brief in opposition that Comcast had forfeited these arguments by not presenting them to the lower courts. Plaintiffs are therefore precluded from arguing forfeiture at this stage. *See* S. Ct. R. 15.2; *see also, e.g.*, *Okla. City* v. *Tuttle*, 471 U.S. 808, 816 (1985). In any event, Plaintiffs' claims of forfeiture are meritless.

A. Plaintiffs' forfeiture arguments proceed from the assumption that Comcast was required not only to tell the district court that Dr. McClave's model was junk and completely unusable in the class certi-

fication analysis—as it repeatedly did—but *also* separately to object to "admission" of Dr. McClave's opinions at the evidentiary hearing, Behrend Br. 24, or to file a motion to strike his reports, *id.* at 33. In resolving a pretrial motion, however, a district court may consider evidence that would not be admissible at trial, Fed. R. Civ. P. 43(c)—including affidavits and expert reports, which are hearsay if offered for the truth of their contents, Fed. R. Evid. 801(c). Of course, such evidence must be admissible *if offered at trial*—for example, by presenting live testimony from the witness who signed the affidavit or report—so that the issue is not whether the district court erred in "admitting" Dr. McClave's reports as a summary of his anticipated testimony, but whether the substance of those reports—Dr. McClave's opinions—constituted class-wide proof that would be admissible when it counts.

In other words, the question before this Court is whether the district court erred in *relying* on Dr. McClave's opinions to conclude that Plaintiffs had proven predominance. The district court has the responsibility of determining whether the proponent of certification has "affirmatively demonstrate[d]" that Rule 23 is, "*in fact*," satisfied. *Dukes*, 131 S. Ct. at 2551. Such a determination cannot be made, or sustained on appeal, if "the only evidence proffered would not be admissible" *at trial* as "proof of anything." Pet. App. 66a n.18 (Jordan, J., dissenting). Comcast made *that* objection, which preserves the issue for appellate review irrespective of whether it could also have moved to strike Plaintiffs' evidence.

See, e.g., *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 980 n.6 (9th Cir. 2011).[1]

B. Comcast has protested to every judge who would listen that Dr. McClave's hopelessly flawed model is divorced from both the legal theories at issue in this case and reality. Since Comcast is entitled to raise "any argument in support" of its contentions, *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992), Plaintiffs' discussion of the plain-error standard (at 24-31) is a waste of paper and ink.

1. Comcast has consistently challenged Dr. McClave's inability to prove damages attributable specifically to deterred overbuilding ever since the district court first informed the parties that it might "credit at least one, but not all," of Plaintiffs' theories of antitrust impact. C.A. J.A. 1371. Comcast argued in the district court, as it does now, that Dr. McClave's "analysis is unavailing" if "any prong of plaintiff[s'] liability case is not found to support a finding of impact," because he "took all of the conduct, as a whole." *Id.* at 1524. And on appeal, Comcast argued in each of its briefs, during the oral argument, and in seeking rehearing that the district court abused its discretion in relying on Dr. McClave's model because "the model calculates damages based on theories of impact that were excluded by the district court." C.A. Br. ii (capitalization omit-

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[1] Plaintiffs' forfeiture argument would lead to the bizarre result that class certification could be granted based on evidence that would not ultimately be admitted at the class trial—and the failure of proof would leave the absent class members bound by the adverse judgment. *See Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 160-61 (1982).

ted); *see also id.* at 37-40; C.A. Reply Br. 17-19; C.A. Tr. 51-52; Rehearing Pet. 9-10.

Tellingly, each of the district court (Pet. App. 186a-187a), the Third Circuit majority (*id.* at 44a-48a), and the Third Circuit dissent (*id.* at 68a-70a) addressed Comcast's argument, never suggesting that it had not adequately been preserved.

2. Comcast has also consistently maintained that Dr. McClave's damages model is so unreliable that it could "not . . . be accepted" in ruling on class certification. C.A. J.A. 1524.

Comcast adduced considerable evidence that "Dr. McClave's methods" are "*flawed*" and that "*no conclusion can be reached from them*," J.A. 1070a, and argued on this basis that the model was "not usable" by the district court, C.A. J.A. 1525. Indeed, although the district court rejected Comcast's argument, *see* Pet. App. 165a-187a, it "*agree*[*d*]" that Dr. McClave's model "ha[d] to have a reliable basis" to be invoked in support of certification, C.A. J.A. 1516-17 (emphasis added).

Before the Third Circuit, Comcast asserted as "error" the district court's decision to "accept bare theory as 'proof,' much less proof sufficient to satisfy" Rule 23(b)(3). Rule 23(f) Pet. 2. Comcast identified the same "fundamental defects" in Dr. McClave's model that it raises here, emphasizing that they "preclude" use of the model in "calculating classwide damages." C.A. Br. 37. It challenged both benchmark screens used by Dr. McClave as "factually unsupported and economically unsound," *id.* at 40, "substantively invalid," *id.* at 42, and based on "unfounded assumptions," *id.* 46; Comcast emphasized that the model "fail[ed] to account for dramatic demographic variations," *id.* at 2, and urged that these

"numerous fundamental defects . . . preclude [the model's] use in calculating classwide damages," *id.* at 37; *see also* C.A. Reply Br. 3, 19-25 (arguing that these defects rendered the analysis "unreliable" and that it was "error for the court to accept that methodology").

Plaintiffs seize on the Third Circuit's statement that Comcast had not "raise[d] th[e] issue" that "*Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies at the stage of class certification." Pet. App. 43 n.13. But this claim is factually incorrect, as well as legally irrelevant because "there can be no waiver . . . of the Judge's duty to apply the correct legal standard." *Id.* at 64a n.17 (Jordan, J., dissenting) (quoting *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 302 n.20 (3d Cir. 2010)). The predominance issue was properly presented below, and the Third Circuit had the responsibility to decide that claim using the "proper construction of governing law." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

Moreover, for the proposition that courts have "rejected damages models" for flaws similar to those here, Comcast cited several cases applying *Daubert*. C.A. Br. 46-47 (citing *Craftsman Limousine, Inc.* v. *Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir. 2004), and *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000)). This was sufficient to put the Third Circuit on notice of the basis for Comcast's objection. *See, e.g.*, *Mead* v. *Independence Ass'n*, 684 F.3d 226, 232 n.1 (1st Cir. 2012); *cf. Taylor* v. *Illinois*, 484 U.S. 400, 406 n.9 (1988).

The rule that parties must preserve an issue in the lower courts "does not demand the incantation of particular words," let alone particular cases, but in-

stead that the lower courts "be fairly put on notice as to the substance of the issue." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000). As Judge Jordan recognized, the "substance of Comcast's challenge" (Pet. App. 66a n.18) has always been that Dr. McClave's model suffers from fatal methodological flaws and does not fit Plaintiffs' legal theory. The majority itself acknowledged that Comcast had properly presented its "attacks on the merits of the methodology," and its rejection of those arguments was based not on forfeiture but instead on the majority's erroneous conclusion that they "have no place in the class certification inquiry." *Id.* at 48a. Plaintiffs are unable to defend the decision below on its own terms, and their forfeiture dodge fares no better.

III. PLAINTIFFS FAILED TO PROVE THAT COMMON QUESTIONS PREDOMINATE.

Plaintiffs conceded below, and the lower courts agreed, that they could obtain class certification only by "establish[ing] that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a. Plaintiffs relied solely on Dr. McClave's model for that purpose. Yet Comcast has shown, and Plaintiffs do not seriously dispute, that the Third Circuit erred in refusing to review the district court's acceptance of the model, and that error alone warrants reversal. Moreover, Comcast has established that Dr. McClave's methodology is so unreliable and inadequate that the district court abused its discretion in relying on his model to certify the class. Without that model, Plaintiffs have no class-wide evidence of damages and cannot satisfy Rule 23(b)(3)'s predominance requirement.

A. Dr. McClave's Model Does Not Isolate Damages Caused By The Only Remaining Liability Theory.

Before the district court ruled on their motion for class certification, Plaintiffs defended Dr. McClave's model as a reasonable estimate of damages caused by *all four* theories of antitrust impact then being asserted, claiming that "all of the mechanisms of harm" were "included in Dr. McClave's damages analysis." C.A. J.A. 1533. "The fact that Dr. McClave included various screens in his analysis," they insisted, "demonstrates that." *Ibid.*

But after it became clear that the court would not accept all four theories of antitrust impact, *see, e.g.*, Pet. App. 192a-193a, Plaintiffs shifted positions entirely to argue, as they do before this Court, that Dr. McClave's "selection of the benchmark counties does not depend on any one ground for liability," Behrend Br. 39. According to Plaintiffs, cable prices within the Philadelphia DMA "reflect the impact of any anticompetitive conduct there," and Dr. McClave simply "isolate[d] the effect of the anticompetitive conduct." *Ibid.* The problem is that Dr. McClave did not do what Plaintiffs now claim.

1. The central premise of Dr. McClave's damages model is that, by identifying "markets or areas that were relatively free of the [effects] of what [he] understood to be the challenged behavior in this case," he could estimate what cable prices would have been in Philadelphia in the absence of that "challenged behavior." J.A. 98a; *see also id.* at 1379a. To have any claim to validity, this approach to measuring damages would have to identify comparison markets that are "'sufficiently comparable'" to the Philadelphia DMA *but for* whatever conduct Plaintiffs allege as

an antitrust violation. *Id.* at 1442a (quoting *id.* at 890a-891a). Otherwise, any lower prices in the comparison markets might be the result of *other differences* between the Philadelphia DMA and those markets. *See* Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 432 (3d ed. 2011) (damages model must "isolate the loss of value caused by the harmful act and exclude any change . . . arising from other sources"); *see also, e.g.*, Economists Br. 14.

Plaintiffs now seek to jettison this essential premise of Dr. McClave's analysis, insisting that he sought only to identify "relatively competitive markets" in some Platonic sense. Behrend Br. 39 (citing J.A. 99a, 208a, 261a). As Plaintiffs' own record citations show, however, Dr. McClave acknowledged that he tried to identify benchmark counties that "resemble what would have been the characteristics of the counties in Philadelphia *but for the allegations in the Complaint*," J.A. 208a (emphasis added); *see also id.* at 99a ("looking for markets that didn't look like" Philadelphia because there was no "challenged behavior"). As Dr. McClave recognized, the issue is not whether prices in Philadelphia are higher than in a more competitive market, but instead the "extent to which cable prices have been elevated, if at all, by *the conduct alleged by Plaintiffs*." *Id.* at 1377a (emphasis added); *see also id.* at 90a-91a, 189a, 193a. That is, merely positing that Philadelphia is not fully competitive in some sense does not establish that this condition is the result of any illegal conduct by Comcast.

For example, Plaintiffs claimed that Comcast's anticompetitive conduct had deterred entry by satellite ("DBS") providers, such as DirecTV. Although satellite potentially competes with cable in every

home in the country, *see Time Warner Entm't Co.* v. *FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001), satellite penetration in particular areas may be low based on a host of factors, such as poor line of sight to the satellite. The district court concluded that Plaintiffs' DBS theory could not support class certification. *See* Pet. App. 122a. Yet Dr. McClave *excluded* counties with below-average levels of DBS competition from his "benchmarks" to "test the price effects of constrained DBS penetration in the Philadelphia market." J.A. 1442a. As he explained, "if someone complains that [his] benchmark had high DBS penetration," the "answer is it[']s supposed to" because, "if plaintiffs are right, the challenged behavior has constrained DBS penetration here." *Id.* at 99a; *see also* C.A. J.A. 1533 (arguing that Dr. McClave "took into account the DBS foreclosure claim by including a DBS penetration screen").

"DBS penetration in the Philadelphia DMA," however, "is below the national average," *id.* at 75a (Jordan, J., dissenting), for reasons that—*ex hypothesi*, since the district court excluded this theory—have nothing to do with anticompetitive conduct. Yet Dr. McClave's decision to omit counties with below-average DBS penetration rates, *see* J.A. 1380a-1381a, ensures that some unknown portion of his calculation estimates "damages" that are "not the result of reduced overbuilding," Pet. App. 69a (Jordan, J., dissenting); *see also Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998). The upshot is that Dr. McClave's model "improperly attributes" price differences between the Philadelphia DMA and the benchmarks to Comcast's allegedly "illegal acts, despite the presence of significant other factors" that bear on cable prices in Phila-

delphia. *MCI Commc'ns Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1162 (7th Cir. 1983).

Correcting this error is not merely a matter of reducing the overall damages amount while still allowing the report as class-wide proof, as Plaintiffs suggest (at 46-47). Dr. McClave manufactured uniformity across the entire Philadelphia DMA by invoking DMA-wide averages and assuming that the same competitive conditions would have prevailed in each franchise area in the absence of the alleged antitrust violations. *See* Comcast Br. 44-49. But the supposition that overbuilding would have occurred on a uniform basis, or at the same time, across the entire region creates such a profound "analytical gap" between Dr. McClave's model and reality that it would render the model unusable *even if* it were limited to a single theory of antitrust impact. *See Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997); *see also* J.A. 819a-821a. Yet even indulging the fictional world created by Dr. McClave, he needed to show that he could reliably measure the effects of deterred overbuilding alone—a likely impossible task that would have required him to develop a new set of benchmark counties and defend the screens used to select them (or at least to create a new regression model to correct for price differences unrelated to overbuilding). *Cf.* J.A. 1442a. Since Dr. McClave did not do so, Plaintiffs have no evidence with which to defend the certification order.

2. Plaintiffs also object that Comcast's argument rests on the "false notion" that there is a "causal relation" between each of their theories of antitrust impact and Dr. McClave's model, but that Comcast failed to establish such a connection. Behrend Br. 46. This is chutzpah. Dr. McClave purported to

identify and measure higher cable prices in the Philadelphia DMA than in markets supposedly unaffected by the four theories of antitrust impact then pursued by Plaintiffs, and Plaintiffs introduced evidence that each of those theories led to higher prices. Yet they now seek to defend Dr. McClave's model by positing that three-fourths of the antitrust theories on which they brought and prosecuted an $875 million damages claim (pre-trebling) for increased cable prices might—*mirabile dictu*—be *irrelevant* to cable pricing.

By pointing out the basic flaw that Dr. McClave admittedly considered the then-alleged anticompetitive conduct only "as a whole," J.A. 189a-190a, Comcast is not "hoisting itself with its own petard." Behrend Br. 46. Comcast maintains not only that Plaintiffs' theories of antitrust impact are bunk, but that it was *their* burden at the certification stage to establish predominance, and thus *their* burden to show that Dr. McClave's model was capable of measuring damages on a class-wide basis for the only remaining theory of antitrust impact—a burden they wrongly seek to place on Comcast "as a matter of law," *id.* at 45.

If Dr. McClave believed that only one of the theories of antitrust impact had *actually* resulted in increased prices, so that inclusion of the other three theories in his model was harmless error, it was incumbent on Plaintiffs to present *evidence* on that point. They did not, of course, because they were unwilling to let go of their claim that *all* of the four theories resulted in damages. *See* J.A. 768a-769a n.24. There is simply no basis for concluding (and certainly no *evidence* in the record) that the *exact* same counties would have been the appropriate

benchmark, yielding the *exact* same damages amount, when the case was limited to only one of Plaintiffs' theories. The flaws in Plaintiffs' position are so clear that one need not even "delve one yard below" the surface to "blow" their arguments "at the moon." William Shakespeare, *Hamlet* act 3, scene 4.

3. Even Dr. McClave understood that his model would calculate damages for more than just reduced overbuilding: He expressly "assumed that only the five counties that RCN indicated it planned to enter as an overbuilder would have been overbuilt." J.A. 1382a; *see also id.* at 1387a (same). But while Plaintiffs now deny that Dr. McClave made this assumption, Behrend Br. 41, they base their argument on an *entirely new* damages report that was created by Dr. McClave only after this case had been pending *in this Court* for almost four months—and more than two years after the decision they seek to defend. *See id.* at 41-42.

Plaintiffs are forced to rely on Dr. McClave's *post hoc* rationalization because his previous reports and testimony—the materials that were *actually* before the district court when it ruled—admitted that only "five of the 16 [counties where Comcast competed] were overbuilding counties" in his model. J.A. 175a-176a. Indeed, Dr. McClave sought to defend his model as "conservative" because it had not considered potential overbuilding "in a greater number of counties" than "just five." *Id.* at 175a; *see also id.* at 1385a (same).

Yet even if Dr. McClave's new report were consistent with his earlier reports and testimony, that *still* would not be a basis for this Court to consider it. If the Third Circuit had addressed Comcast's argu-

ments, the issue on appeal would have been whether the district court abused its discretion based on the "record before the court at the time of its decision, not events allegedly occurring thereafter." *Mason* v. *Okla. Tpk. Auth.*, 115 F.3d 1442, 1458 n.13 (10th Cir. 1997), *overruled on other grounds by TW Telecom Holdings Inc.* v. *Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011); *see also, e.g.*, *Meilleur* v. *Strong*, 682 F.3d 56, 63 (2d Cir. 2012) ("we must look at the facts before the district court at the time of its decision"). The fact that Plaintiffs are forced to resort to extra-record evidence is simply confirmation that the district court's decision *was* an abuse of discretion based on the actual record before it.

In all events, the post-certification report does not help Plaintiffs. Dr. McClave claims that, while his original model found "higher" damages for the "five counties that RCN indicated it initially planned to overbuild," it also calculated "positive, substantial, and statistically significant" damages from the remaining eleven counties. D.E. 512 Ex. 1, at 9. But this is *precisely* the methodological problem. Dr. McClave found "damages" in counties that his model assumed would *not* be overbuilt, which makes clear that he understood (then, if not now) that his model included "damages" from Plaintiffs' other theories.[2]

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[2] Plaintiffs attempt to bolster their argument (at 42) by invoking their liability expert, Dr. Michael Williams, who claimed that Comcast decreased the "likelihood of over-building" in the entire DMA. J.A. 404a. Comcast has constantly challenged the reliability of Dr. Williams's conclusions, but even taking them at face value the issue here is whether the *price effects* of that overbuilding can be measured on a class-wide basis. Dr. Williams speculated that RCN might have expanded into other portions of the Philadelphia DMA, *see* C.A. J.A. 4306, but he did

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B. Dr. McClave's Model Suffers From Fatal Methodological Flaws.

In its opening brief (at 44-49), Comcast demonstrated that Dr. McClave's two screens for identifying benchmark counties rest on serious methodological errors, and that those errors cannot be fixed because "[t]he variation in conditions within the nearly 650 franchise areas in the Philadelphia DMA means that the issue of damages is more fractured than a single class can accommodate." Pet. App. 88a (Jordan, J., dissenting). Plaintiffs *nowhere* attempt to defend Dr. McClave's screens, or respond to the wide variability across the class—undoubtedly because they have nothing more than Dr. McClave's legally inadequate *ipse dixit* to connect his theory with anything resembling the real world. *See Joiner*, 522 U.S. 146.

1. Plaintiffs concede that, with respect to expert opinion evidence, "the competence and reliability of the expert testimony are properly before the court at the time of the certification decision." Behrend Br. 33. They are therefore forced to distance themselves from the Third Circuit's conclusion that certification may be based on expert testimony that is not now, but perhaps "may evolve to become," consistent with Rule 702 and *Daubert*. *Id.* at 34. Indeed, Plaintiffs admit that courts must "resolve evidentiary ob-

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not suggest that this overbuilding would have occurred *uniformly* throughout the class. *See* Comcast Br. 47. In any event, as Dr. Williams acknowledged, Plaintiffs attempted to *measure* damages solely using "Dr. McClave's regression analysis," J.A. 1309a, which (Dr. Williams agreed) had assumed only five overbuilt counties, *see id.* at 472a ("those are the five counties that Dr. McClave used in his damage study").

jections, including under *Daubert*," when those issues bear on the certification inquiry. *Id.* at 32.

Plaintiffs acknowledge that, "[i]n many cases, perhaps most," the proponent of class certification will need to "prov[e] class-wide damages with admissible evidence" in order to show that "class-wide methods of proving damages" would "be available at trial." Behrend Br. 33-34. They suggest, however, that the "preliminary" nature of the class certification inquiry warrants a "lower threshold" for evaluating admissibility than would apply at trial. *Id.* at 36.

Whatever lowered *Daubert* standard Plaintiffs might have in mind—they do not spell it out in their brief—they and other proponents of class certification cannot evade the "rigorous analysis" required by Rule 23. *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982). Rule 23(b)(3) demands that the proponent of class certification *prove* that common questions predominate over individual ones, *see Dukes*, 131 S. Ct. at 2551, yet Plaintiffs nowhere explain how the proponent could carry this burden by pointing to expert opinions that could never be presented to a jury. *See* Comcast Br. 38-40; *see also supra* at 5 n.1. If the model "does not directly prove damages on a class-wide basis," then it necessarily cannot help the proponent show that "class-wide methods of proving damages" will *actually* "be available at trial." Behrend Br. 33-34.[3]

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[3] For this reason, it is irrelevant that the "usual concerns" of *Daubert* and Rule 702 arguably "are not present" when the factfinder is the district judge rather than a jury. *Metavante Corp.* v. *Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010), *quoted in* Behrend Br. 35. The text of Rule 702 does not suggest

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2. Plaintiffs' application of their approach illustrates how far it departs from Rule 23. They do not bother to defend Dr. McClave's screens, arguing instead that "changing or discarding the two screens" in some undefined way would "merely change the benchmark and thus result in a different damages total." Behrend Br. 47.

It is tautological that altering the benchmark sample would likely change the amount of so-called "damages" calculated by Dr. McClave. But this presumes the screens used to determine the benchmark *can* be changed in a manner that satisfies Rule 702 and *Daubert*. And on that issue, the Third Circuit punted: It speculated that "the District Court *likely* determined that Dr. McClave's model *could be* refined between the time when class certification was granted and trial so as to comply with *Daubert*." Pet. App. 44a n.13 (emphases added).

Plaintiffs' approach would thus permit class certification based only on the unproven assumption that they could fix each of the problems identified by Comcast. But there would be little point in requiring courts to *find* that Rule 23's prerequisites are satisfied based on actual evidence if the "assurance of

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that it applies differently as between bench and jury trials; it speaks categorically to when an expert "may testify in the form of an opinion or otherwise," Fed. R. Evid. 702. In any event, the class certification inquiry looks to whether "class-wide methods" of proof "will (or will not) be available at trial." Behrend Br. 33-34. That the judge might not be "swayed by dubious scientific testimony" in ruling on class certification (*In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011)) hardly matters when the question is instead about a future trial.

counsel that some solution will be found" (*Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (en banc)) were sufficient to satisfy Rule 23.

Plaintiffs also try to co-opt the report submitted by Comcast's damages expert, Dr. Tasneem Chipty, to show that "damages remain class-wide and substantial." Behrend Br. 47 (emphasis omitted). But Dr. Chipty explained that, after making only two corrections (*viz.*, using actual rather than list prices and accounting for differences in population density), Dr. McClave's model generates negative damages for a substantial portion of the class during much of the class period—a clear sign that the model is not properly measuring *class-wide* damages. *See* J.A. 1068a-1070a. This is not just an issue of "chang[ing]" the "final amount of estimated damages," Pet. App. 49a, but instead of determining whether Dr. McClave's model and methodology can ever *accurately* determine damages for the entire class without assuming away differences in but-for price caused by varying competitive conditions in Comcast's franchise areas.

3. The danger in presuming that Dr. McClave's damages model could be repaired is particularly acute because, as Judge Jordan noted, the "wide variation in the relative market shares" across Comcast's 650 franchise areas in the Philadelphia DMA "makes it hard to imagine a means of calculating class-wide damages." Pet. App. 85a. Dr. McClave's screens used DMA-wide averages, but there is no assurance that they can be changed to account for the "variation in conditions" within the DMA. *Id.* at 88a.

Judge Jordan explained that it would be impossible to make such an adjustment: "This primary flaw in Dr. McClave's methodology—using a single

set of assumptions for the entire Philadelphia DMA—cannot be fixed merely by altering his model." Pet. App. 86a. But even if the Court were to assume, as Plaintiffs do, that Dr. McClave *might* be able to correct his damages model, such a "presum[ption]" would be insufficient to establish "actual . . . conformance" with Rule 23. *Falcon*, 457 U.S. at 160.

C. The Need For Plaintiffs To Prove Damages On An Individualized Basis Precludes Class Certification.

Plaintiffs insist that the "need to allocate the class-wide damages award among class members does not cause individual issues to predominate." Behrend Br. 49. But the issue here is not whether Plaintiffs can properly divide up a "class-wide damages award" in some later stage of the proceeding, but instead whether damages are *capable* of class-wide proof—and, if not, whether the individual questions raised by that element of the class members' claims predominate over any common questions.

On that point, Plaintiffs assert simultaneously that "'the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3),'" and that "[t]he class may properly prove damages on an aggregate basis." Behrend Br. 49 (quoting *Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012)). But Plaintiffs are mistaken in both respects.

1. Plaintiffs appear to advance a categorical rule that individualized damages questions can *never* prevent a district court from finding predominance under Rule 23(b)(3). But they took the opposite position below, asserting that the district court "must . . . find" that they have "identified *common* proof tending to show class wide . . . damages." D.E. 331, at 5;

see also Opp. 13 n.1. And the Third Circuit itself acknowledged that Plaintiffs were required to "establish that the alleged damages are capable of measurement on a class-wide basis using common proof." Pet. App. 34a.

Plaintiffs' sole authority, *Messner*, reasoned that "'the need for individual damages determinations does not, in and of itself, require denial of [a] motion for certification.'" 669 F.3d at 815 (quoting *Arreola* v. *Godinez*, 546 F.3d 788, 801 (7th Cir. 2008)). Assuming, *arguendo*, that this is so, it does not mean that such cases are the rule rather than the exception, and it certainly does not establish that *this* is such a case. Indeed, it is notable that the Seventh Circuit in *Messner* (unlike the Third Circuit here) concluded it would be an "appropriate and limited use of merits evidence at the certification stage" for the defendant "to argue that [an expert's] methodologies were flawed." *Id.* at 823.

The text of Rule 23 does not suggest that courts can ignore damages questions in evaluating predominance; instead, it permits certification only if "the court finds that the questions of law or fact common to class members predominate over *any questions* affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added). And in many cases where the asserted claims require proof of damages as an element, the need for separate damages determinations for class member would "make the damage aspect of [the] case predominate, and render the case unmanageable as a class action." *Windham*, 565 F.2d at 68 (footnotes and internal quotation marks omitted); *see also* Comcast Br. 32. Plaintiffs never explain how class-wide adjudication would be appropriate if, as in this case, the resolution of common

issues could not eliminate the need for at least *four decades* of further litigation to resolve the class members' claims. *See id.* at 34.

2. Plaintiffs equally miss the mark in claiming that they are permitted to prove "aggregate damages," and then "allocate" them among class members. The only case cited by Plaintiffs in support of their argument permits an "aggregate damages calculatio[n]," *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009), but only *after* accepting an expert's class-wide damages methodology as "sufficiently reliable," *id.* at 198.

Under Plaintiffs' approach, they would establish a single overcharge amount for each county and year, and then apply that to class members based on residency. But if Comcast is correct that Dr. McClave's damages model does not measure damages from the relevant antitrust impact, or that it is not an acceptable method for proving class-wide damages because of variations within the DMA and individual counties, then this so-called "damages" amount is wrong: It both overstates the extent of Comcast's liability to the class, and averages away the variation in damages among class members. This is precisely what the Rules Enabling Act prohibits: an alteration of the parties' substantive rights under the guise of procedure. *See* Comcast Br. 29-31; *see also, e.g.*, *Dukes*, 131 S. Ct. at 2561 (rejecting "Trial by Formula"); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (rejecting "gross damages" approach).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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The American Law Institute, Principles of the Law on Aggregate Litigation § 2.6, Reporters' Notes, Comment b. (2010) 22, 25

INTEREST OF *AMICI CURIAE*

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. The goals of U.S. competition policy could be seriously undermined if the Court were to break with settled doctrine and demand that antitrust plaintiffs must prove the amount of damages to which class members are entitled as part of the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). The AAI respectfully submits this *amicus* brief for two reasons: (1) the issues pertaining to the predominance requirement in antitrust cases are not obvious – they can be highly nuanced – and may have potential implications that are difficult to identify for anyone not intimately familiar with doctrine and practice in the area; and (2) the parties may not address all of the policy issues of concern to antitrust litigants generally.[1]

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[1] The parties have lodged blanket consents to the filing of *amicus* briefs with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* has made a monetary contribution to its preparation or submission.

The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent

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The American Independent Business Alliance (AMIBA) joins this brief as *amicus curiae*. AMIBA is a national nonprofit organization helping communities implement programs to support independent locally-owned businesses and maintain ongoing opportunities for entrepreneurs. AMIBA supports more than 80 affiliated community organizations across 38 states. AMIBA's affiliated organizations represent approximately 25,000 independent businesses covering virtually every sector of business, many of which face direct competition from multinational and other large corporations.

AMIBA seeks to strengthen and enforce federal laws that prohibit predatory pricing, price discrimination, and unfair practices disadvantaging independent businesses. AMIBA maintains that preventing the largest businesses from misusing their size, market and political power to gain an unfair advantage over or to place an undue burden upon smaller competitors is essential to protecting consumers and ensuring independent businesses have an opportunity to compete and receive fair and reasonable treatment under the law.

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antitrust lawyers, law professors, economists, and business leaders. The AAI's Board of Directors alone has approved this filing for the AAI. The individual views of members of the Advisory Board may differ from the AAI's positions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici understand this Court to have narrowed the issue before it on *certiorari* to focus on the kinds of evidence a plaintiff must submit in support of class certification. To be more precise, we understand the Court to have focused its inquiry on whether plaintiffs moving for class certification must submit "admissible evidence, including expert testimony." *Comcast Corp. v. Behrend*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3707 (U.S. Jun. 25, 2012). This issue seems to follow naturally from one that remained open after this Court's opinion in *Dukes* about the scope of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011) (raising but not resolving whether a *Daubert* analysis is appropriate at class certification). In other words, the issue appears to be about *how* plaintiffs may make an appropriate showing to certify a class. There is, however, at least the potential that the Court could address a different issue, even if only incidentally.

The second issue is about *what* it is that plaintiffs must show for a court to certify a class. Admittedly, this Court may choose not to address that second issue at all. But it is implicated by this Court's framing of the showing plaintiffs must make to certify a class: "that the case is susceptible to awarding damages on a class-wide basis." *Comcast Corp. v. Behrend*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3707 (U.S. Jun. 25, 2012). In other words, a

secondary issue could potentially be *what* plaintiffs must show for a court to certify a class.

This brief will not address the former issue – the *how* – in any great depth. The parties have done so. Instead, this brief focuses on the latter issue, the *what*. *Amici* respectfully suggest both that it is unclear what it means to require plaintiffs to show a case is "susceptible to awarding damages on a class-wide basis" and that any such requirement, however framed, could have significant unintended ramifications and, potentially, could conflict with well-settled doctrine.

ARGUMENT

I. PLAINTIFFS' BURDEN REGARDING DAMAGES AT CLASS CERTIFICATION REQUIRES CAREFUL CONSIDERATION

Reading Petitioners' brief, it would be possible to infer that plaintiffs seeking to satisfy Rule 23(b)(3)'s predominance requirement must use common evidence to persuade a court that each absent class member is entitled to damages and must demonstrate the amount of the damages each class member should receive. Such a legal standard would upset decades of settled doctrine in ways both obvious and subtle. For example, courts have long held that plaintiffs need not show for purposes of class certification that they will *prevail* at trial, but only that common issues will predominate as they endeavor to do so. Similarly,

courts have held that it is generally sufficient – but not always necessary – for plaintiffs to offer common proof capable of showing that a defendant's conduct caused *some* harm to a significant proportion of the class, but not necessarily to all class members and not necessarily in an amount for each class member that can be calculated using common evidence.

As the phrasing of these points suggests, these are refined and technical matters. The differences in legal standards can seem quite small, yet they can have sweeping consequences. It would be easy to place a burden on plaintiffs – even inadvertently – that makes certification of an antitrust class impractical, and to do so in a way that is inconsistent with the requirements of Rule 23 and with sound policy. *See, e.g.*, *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (Posner, J.) (suggesting the existence of uninjured members in a class may be inevitable); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (suggesting that there would be little room left for antitrust class actions if individualized issues regarding the amount of damages could defeat class certification).

The subtlety of the topic is apparent in the difficulty of giving precise content to the phrase "susceptible to awarding damages on a class-wide basis." The phrase can have various meanings. Does it signify that plaintiffs must persuade the judge by a

preponderance of the evidence that common evidence shows *all* class members suffered some harm?[2] That plaintiffs can use common evidence to *attempt* to show that *all* class members suffered *some* harm? That plaintiffs can use common evidence to *attempt* to show that *most* – or some supermajority – of the class suffered *some* harm? That plaintiffs can use common evidence to show the *amount* of the harm to *each* individual class member, perhaps through the use of some formula?

Amici respectfully submit that the answer to all of these questions should be negative, at least if they are posed categorically. A court should at times certify a class under Rule 23(b)(3) even if a judge concludes common evidence *does not* establish some harm to all class members, even if the judge believes common evidence *cannot* show the overall harm to the class as a whole, and even if the judge concludes common evidence *cannot* provide a formulaic approach for gauging the damages of each class member. This is in part because Rule 23(b)(3) requires only that common issues predominate, not that litigation involves only common issues. In some antitrust cases, the common predominant issue is whether a defendant violated

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[2] *But see* Fed. R. Civ. P. 23(c)(1)(A) advisory committee notes to 2003 Amendment (noting "an evaluation of the probable outcome on the merits is not properly part of the certification decision" and suggesting an issue before a court at class certification is whether "the issues likely to be presented at trial" are "susceptible of class-wide proof").

the antitrust laws, not whether it caused harm to the class in general, much less whether every single class member suffered harm or the amount of damages to which each class member is entitled. *Amici* submit this brief in part to bring these distinctions to the attention of the Court.

A. Five Key Points About Antitrust Class Actions

Five points are paramount in understanding class certification doctrine as it has been applied in antitrust cases. The first is that plaintiffs need show that common issues will predominate in their *attempt* to prevail, not that they will ultimately succeed. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008) (holding the plaintiffs' burden at class certification is not to prevail on the merits but to show issues are "capable of proof at trial through evidence that is common to the class"); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 152 (3d Cir. 2002) (holding plaintiffs must propose a plausible or colorable method of proving their case using predominantly common evidence); *see generally* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 976-78 (2010) (hereinafter "Davis & Cramer, *Politics of Procedure*"). We do not understand this Court in *Dukes* or lower courts in other cases to have disturbed that time-honored rule. *See Dukes*, 131 S. Ct. at 2551 (noting standard at class certification is whether an issue is "*capable* of classwide resolution –

which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke") (emphasis added).[3]

This principle has significant consequences for the showing plaintiffs must make to establish for purposes of Rule 23(b)(3) that a case is susceptible to awarding damages on a class-wide basis. In particular, class certification would be perfectly appropriate if the trial would resolve the claims of all class members, even if it appeared highly likely that the defendant would prevail. What matters, in other words, is whether evidence *capable* of persuading a court is predominantly common, *Dukes*, 131 S. Ct. at 2551, not that the factfinder will ultimately be persuaded.

A second point is that Rule 23(b)(3) requires merely that common issues predominate, not that all issues are common. Certification of a class may be warranted under Rule 23(b)(3) even if litigation will involve some – even significant – individual issues. *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108-09 (2d Cir. 2007). Rule 23(b)(3) requires only that common issues play a predominant role – a greater role in litigation than

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[3] *Amici* recognize that *Dukes* addressed class certification only under Rule 23(b)(2) – not Rule 23(b)(3) – and as a result the case offers little or no guidance regarding the predominance standard under Rule 23(b)(3). *Dukes*, 131 S. Ct. 2541, 2554. *Amici* understand the Third Circuit to have distinguished *Dukes* in part for this reason. *Behrend v. Comcast Corp.*, 655 F.3d 182, 203 n.12 (3d Cir. 2011).

individual issues – not that individual issues play an insignificant role or no role at all. *Id*; *Visa Check*, 280 F.3d at 140 ("The predominance requirement calls only for predominance, not exclusivity, of common questions.") (quoting *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 328 (E.D.N.Y. 1982)); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 340 (D.N.J. 1997) ("That common issues must be shown to 'predominate' does not mean that individual issues need be nonexistent.").[4] Thus common issues may predominate even if an inquiry into the harm caused by an antitrust violation requires individualized attention. For example, litigation and trial may focus on what legal standard applies to a defendant's conduct and whether the defendant engaged in behavior that violated that legal standard. In other words, the predominant issue in an antitrust case may be – and often is – whether the defendant violated the antitrust laws. And that issue may be – and often is – common to the class. If so, common issues may predominate, despite individualized issues regarding the harm done to particular class members. *Cordes*, 502 F.3d at 108 ("Even if the district court concludes that the issue of injury-in-fact presents individual questions, . . . it does not necessarily follow

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[4] *See also Linerboard*, 305 F.3d at 162 ("[T]he mere fact that [individual statute of limitations] concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones."); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (same).

that they predominate over common ones and that class action treatment is therefore unwarranted."); *Visa Check*, 280 F.3d at 140; *see also* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 1006-08.

A third point – related to the second – is that plaintiffs need not be able to offer common evidence that *all* members of a proposed class suffered some harm for common issues to predominate. If plaintiffs can rely on common evidence in attempting to establish that a defendant violated the antitrust laws and thereby caused harm to most – or some supermajority – of the class, common issues are likely to predominate. *Kohen,* 571 F.3d at 677 ("[A] class will often include persons who have not been injured by the defendant's conduct. . . . Such a possibility or indeed inevitability does not preclude class certification."); *see also Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 825 (7th Cir. 2012) (suggesting presence of uninjured class members does not preclude certification unless there are "a great many" of them); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (same); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 321 (E.D. Mich. 2001) (existence of uninjured class members does not preclude class certification); *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 638 (D. Kan. 2008) (generalized injury establishes class-wide impact); *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 293, 310 (D.D.C. 2007) (widespread injury is sufficient for class certification purposes); *In re Rubber Chemicals Antitrust*

Litigation, 232 F.R.D. 346, 352 (N.D. Cal. 2005) (same); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 225 F.R.D. 208, 219 (S.D. Ohio 2003) (same). As noted above, litigation may well focus on whether a defendant violated the antitrust laws. The further inquiry into whether that conduct harmed the class in general – although not necessarily each and every class member – could also be common, leaving only a small part to be played by individual issues. Accordingly, plaintiffs need not offer evidence showing harm to *every* class member to establish the predominance of common issues.

A fourth point is that under longstanding precedent courts in antitrust cases treat the burden of proof regarding the *fact of damage* very differently than they treat the issue of the *amount of damages*. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."). Plaintiffs have a much lighter burden in proving the amount of their damages than in proving they were harmed at all. *Bigelow v. RKO Radio*

Pictures, Inc., 327 U.S. 251, 265-66 (1946); *Story Parchment Co.*, 282 U.S. at 562-63.[5] The logic of this doctrine is, in part, that once a plaintiff has proven it has been wronged under the antitrust laws, any doubt caused by the complexities of economic analysis should be resolved in favor of the innocent plaintiff rather than the culpable defendant. *Bigelow*, 327 U.S. at 265-66; *Story Parchment Co.*, 282 U.S. at 562-66. After all, the defendant created the difficulties of determining damages by interfering illegally with the workings of the market. *Bigelow*, 327 U.S. at 265-66; *Story Parchment Co.*, 282 U.S. at 562-66.

A fifth point – closely related to the fourth – is that if plaintiffs can use common evidence to show an antitrust violation and fact of damage (or impact), common issues are very likely to predominate even if individual issues arise regarding the *amount of damages* to which each class member is entitled. *Visa Check*, 280 F.3d at 140 ("If defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims. Such a result should not be and has not been readily embraced by

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[5] One way to interpret this case law is as drawing a distinction between injury or fact of damage as an element of a plaintiff's antitrust claim – something plaintiffs must prove to prevail – and amount of damages as relevant only to the relief a prevailing plaintiff may obtain.

the various courts confronted with the same argument.") (quoting *Alcoholic Beverages*, 95 F.R.D. at 327-28); *Seijas v. Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010) ("[I]t is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification."); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003) ("Even wide disparity among class members as to the amount of damages suffered does not necessarily mean that class certification is inappropriate . . . , and courts, therefore, have certified classes even in light of the need for individualized calculations of damages.") (citation omitted); *Linerboard*, 305 F.3d at 149 ("The courts have repeatedly focused on the liability issues, in contrast to damage questions, and, if they found issues were common to the class, have held that Rule 23(b)(3) was satisfied.") (internal quotation omitted); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) ("[I]t has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate."); 7B Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1781 (2d ed. 1986) ("It uniformly has been held that differences among the members [of a class] as to the amount of damages incurred does not mean that a class action would be inappropriate.") (collecting cases). As one court put the matter, "'Common proof of impact is possible without common damage amounts.'" *Cardizem*, 200

F.R.D. at 317 (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 694 (D. Minn. 1995)).

Even if the calculation of the amount of damages requires individualized inquiry, the great bulk of the issues may well be common to all class members: antitrust violation, causation, and fact of damage. Moreover, in practice those issues are likely to play an even more significant role than may be immediately evident. Defendants at trial generally argue that they did not engage in the alleged conduct and that they did not cause *any* harm at all. If they are willing to address the amount of damages in any depth – which they are often reluctant to do for strategic reasons – their concern is with their total liability, not with the allocation of damages among class members. Finally, courts can deal with individual damages issues in various ways, including: "(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *Visa Check*, 280 F.3d at 141; *accord* Manual for Complex Litigation, Fourth § 21.5 (2004) ("[T]he court may consider trying common issues first, preserving individual issues for later determination.").

B. Significance for Petitioners' Arguments

Amici raise these points in part because Petitioners muddle them. In arguing against predominance, for example, Petitioners claim "'measurable damages' is an essential element of Plaintiffs' antitrust claims," Pet'r's Br. at 18, and that "the need to prove individualized damages for each of the two million class members would overwhelm any purported common questions in this litigation." *Id.* at 19. This argument could be construed to conflate multiple issues. First, as the Second Circuit noted in *Cordes*, common issues can predominate even if fact of damage involves individualized issues. Second, *impact or fact of damages* is a very different issue than the *amount of damages*. When it comes to the amount of damages – as opposed to the fact of damage – courts often hold that, to certify a class, common evidence need not necessarily be available to calculate the recovery of each class member.

Similarly, Petitioners argue that the "element of damages in antitrust cases (or other cases where proof of damages is an element of plaintiffs' claim) is similar to other claim elements that will preclude class certification in the absence of an acceptable method of class-wide proof." *Id.* at 32. Petitioners then cite to cases holding that reliance is an element of a fraud claim and that individual issues regarding reliance can preclude class certification in fraud cases. *Id.* at 32-33. Petitioners then discuss the difficulties they believe would be involved in calculating the *amount of damages* for each class member in

the case before the Court. *Id.* at 33. This line of argument badly jumbles together distinct issues and, as a result, culminates in a *non sequitur*. Courts may treat fact of damage in antitrust cases just like they treat reliance in some fraud claims, but they treat both very differently than they treat the *amount of damages* in antitrust cases. The fact that some cases have held that individual issues regarding reliance sometimes preclude class certification in non-*antitrust* cases, then, is not relevant. Those cases say little, if anything, about whether individual issues regarding the *amount of damages* should similarly prevent class certification in an *antitrust* case. And the very flexible standard courts have adopted for estimating the amount of damages in antitrust cases makes it, at best, highly implausible that calculating individual damages would involve the "more than 38 years to adjudicate" that Petitioners suggest. *Id.* at 34.

C. Conclusion

In sum, the predominance requirement of Rule 23 is subtle. Significant repercussions may follow from taking a categorical stand – even inadvertently – on, for example, whether plaintiffs must demonstrate they are capable of using common evidence to attempt to show *amount of damages*, as opposed to *fact of damage*. *Amici* write to highlight these issues for the Court, as well as to raise important policy considerations.

II. PETITIONERS' POLICY ARGUMENTS OVERLOOK THE VALUE OF CERTIFYING CLASSES IN APPROPRIATE ANTITRUST CASES

As an additional basis for seeking reversal, Petitioners suggest, in effect, that raising the standard at class certification is necessary to serve public policy interests. *Id.* at 51-53. But policy reasons weigh both for and against certifying classes in antitrust cases, and Petitioners' view fails to provide a balanced picture. Specifically, Petitioners ignore the importance of certifying antitrust claims for class treatment for various reasons, including to promote the compensation and deterrence goals of the antitrust laws, to honor the right to trial by jury, and to adjudicate claims efficiently and accurately. *Amici* emphasize the policy reasons *for* certification because they are often overlooked. Of course, no class should be certified that does not comport with Rule 23. *Amici* respectfully submit, however, that the policy arguments sometimes made for requiring as rigorous a showing as possible under Rule 23 are not very compelling. Rule 23 should be read, instead, in the established manner in antitrust cases.

A. Unpersuasive Arguments Against Certifying Antitrust Classes

1. Neither Evidence Nor Theory Supports the Proposition that Class Certification Creates "Insurmountable Pressure" on Defendants to Settle Cases for More than a Reasonable Amount Relative to the Merits

Petitioners suggest – citing to the unsubstantiated opinions of others – that class certification places tremendous pressure on antitrust defendants to settle. But Petitioners offer no *evidence* for this proposition. *Amici* are not aware that any such evidence exists, and we suspect it does not. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003) (debunking the notion that class certification in effect is a form of legalized blackmail). For example, Petitioners contend that settlement often takes place before defendants file all available dispositive motions, Pet'r's Br. at 52, but without providing any evidentiary basis for this contention. Petitioners also note the effects of the high costs of litigation without attending to whether those costs fall primarily on defendants or plaintiffs, or similarly on both. Given the lack of evidence, it is worth considering the likely dynamics of litigation and settlement.

Several key observations merit consideration. First, antitrust defendants – by definition – tend to be powerful and well-funded. Less so antitrust

plaintiffs. And even if plaintiffs are successful, they are generally not entitled to prejudgment interest on their damages. The plaintiffs, in other words, are unwilling providers of interest-free loans. Defendants in turn can use delay to drive a hard bargain in settlement negotiations – to resolve litigation on highly favorable terms for themselves. Antitrust defendants, then, generally can tolerate extended litigation – and may even gain strategic and other benefits from it – whereas antitrust plaintiffs often cannot. Finally, the evidence suggests that discovery costs are just as high for plaintiffs as they are for defendants in complex litigation. *See generally* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 978-79; Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 Rutgers L. J. 355, 369-71 (2009) (hereinafter "Davis & Cramer, *Of Vulnerable Monopolists*").

Of course, this analysis fails to take into account the role of attorneys. But attention to lawyers just reinforces the same conclusion. Most importantly, the defense attorneys in antitrust class actions tend to be paid by the hour while the plaintiffs' attorneys are compensated on a contingent basis. *Amici* do not mean to impugn the ethics of any lawyers but do believe compensation structures of attorneys are relevant in the settlement context. No doubt many attorneys for both defendants and plaintiffs sacrifice their own interests to those of their clients, as they are ethically required to do. But a policy analysis

should acknowledge what economists call agency costs – including the idea that the judgment of lawyers may at times, even subconsciously, skew toward their own interests. Agency costs tend to suggest that antitrust defendants will fare even better in settlement negotiations. After all, defense attorneys can credibly threaten to protract litigation, impose high costs, and force plaintiffs to survive every meaningful obstacle shy of trial before settling. Contingency fee lawyers, in contrast, generally do better by settling early, even for a relatively modest amount. The upshot is that the lawyers' interests are likely to exacerbate the tendency for antitrust defendants to settle for too little rather than too much. And empirical evidence suggests that in complex cases costs are likely to fall as heavily on plaintiffs – or their attorneys – as on defendants. Thus, costs do not serve as a corrective. *See generally* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 980 (discussing these dynamics); Davis & Cramer, *Of Vulnerable Monopolists*, 41 Rutgers L. J. at 371-72 (same).

None of this is to contest that class certification *increases* the pressure on antitrust defendants to settle. The point instead is that we have every reason to believe those defendants have great advantages in settlement negotiations. Class certification in all likelihood fails to overcome those advantages, although it evens the proverbial playing field to some extent. If anything, that is a reason to favor class certification, not to be leery of it.

Petitioners' suggestion that the Court should distort the requirements of Rule 23 to protect defendants from pressure to settle is unpersuasive for two other reasons. First, the federal rulemaking process has already addressed this issue through Federal Rule of Civil Procedure 23(f), which permits interlocutory appeals of class certification decisions. That approach leaves the class certification standard intact but protects against potential harms from erroneous certification decisions. To base a change in class certification doctrine on the same concern would fail to respect the rulemaking process and would be excessive. Second, class certification is a poor means for assessing the merits of claims. It is not designed for that purpose. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 149 (2009) ("[L]aw declaration is warranted in class certification only insofar as it has the potential to reveal dissimilarity within the class, not as a substitute for the proper evaluation of evidence said to reveal a fatal similarity on an element of the plaintiffs' case on the merits. The latter inquiry remains the proper domain of summary judgment, such as to implicate the role of the court vis-à-vis the factfinder at trial."). If this Court is concerned that defendants face undue pressure to settle in antitrust cases – to be clear, *Amici* believe it should not be – a better way to address the issue is by adjusting the standard for dispositive motions on the merits,

including motions to dismiss and for summary judgment.[6] Indeed, the Court has already taken these measures. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Altering the class certification standard in addition would be overkill, with counterproductive consequences.

2. Class Certification Generally Does Not Hurt Absent Class Members

Petitioners also suggest that certification of a class has "real costs" for absent class members, who may prefer to "go it alone." Pet'r's Br. at 52. But that logic does not withstand scrutiny, at least not in a case like this one. This is not litigation, like *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997), in which class members have not yet suffered injury or cannot yet know they have been injured. Class members who wish to opt out of a class certified under Rule 23(b)(3) can do so. If they lack the resources to take that step, it is hard to imagine they will have the resources to pursue individual litigation. Indeed, that point suggests that Petitioners shed crocodile tears.

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[6] *See* The American Law Institute, Principles of the Law on Aggregate Litigation § 2.6, Reporters' Notes, Comment b. (2010) ("The limitation that the courts should engage questions of law or fact (or mixed questions thereof) only insofar as relevant to its class certification determination stems from the recognition that other procedural mechanisms or pretrial rulings – such as summary judgment – appropriately regulate the relationship between the court and the fact-finder generally.").

Their interests lie (understandably) not in preserving the legal rights of absent class members but in depriving them of any meaningful prospect of pursuing those rights.[7] After all, a class member recovery means a loss to Petitioners.

B. Policy Reasons for Certifying Antitrust Classes in Appropriate Cases

1. Private Antitrust Enforcement: Private Actions Play a Key Role in Enforcing the Antitrust Laws

Of course, failing to certify classes in antitrust cases would not be a matter of much concern if private antitrust enforcement adds little of value to public enforcement. But there is good reason to believe the opposite is true: private antitrust enforcement plays an important policy role.

Legal scholarship has demonstrated the benefits of private enforcement. Research has shown that private enforcement – primarily through class actions – has resulted in recoveries of over $30 billion since 1990. *See* Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of*

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[7] *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (noting that where small-dollar claims are concerned, "'[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits'") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Private Antitrust Enforcement, 36 Seattle U. L. Rev. (forthcoming 2013), *available at* http://ssrn.com/abstract=2132981 (discussing sixty case studies of successful private antitrust enforcement); Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008) (discussing forty case studies of successful private antitrust enforcement actions).[8] Private enforcement usually provides the only means for compensating the victims of antitrust violations, who are often U.S. purchasers preyed on by foreign actors. *See* Davis & Lande, *Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement* at 19-20; Lande & Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. at 894. It also appears to provide a more powerful deterrent to antitrust violations than criminal enforcement of the antitrust laws by the Department of Justice. *See generally* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*,

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[8] The University of San Francisco Law Review article was based on forty case studies reported in Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: Forty Individual Case Studies*, *available at* http://ssrn.com/abstract=1105523. The forthcoming Seattle University Law Review article is based on those same forty case studies as well as an additional twenty case studies reported in Joshua P. Davis & Robert H. Lande, *Summaries of Twenty Cases of Successful Private Antitrust Enforcement*, *available at* http://ssrn.com/abstract=1961669.

2011 B.Y.U. L. Rev. 315 (2011). Making it more difficult to certify a class in antitrust cases, therefore, could significantly undermine the important functions of private antitrust enforcement.

2. Raising the Standard for Class Certification Runs Counter to the Spirit – and Perhaps also the Letter – of the Seventh Amendment Right to Trial by Jury

In many proposed class actions, individual litigation is not a viable alternative, at least not for the vast majority of class members. *See* Fed. R. Civ. P. 23(f) advisory committee notes to 1998 Amendments (noting that a potential class member may have "an individual claim that, standing alone, is far smaller than the costs of litigation"). A denial of class certification will therefore mean that many plaintiffs will lose without ever having a chance to prove their case. Yet Petitioners' argument would empower judges to rule on many issues relating to the merits – even to the amount of damages – before allowing a jury to hear any evidence, even when these issues are irrelevant to the predominance analysis under a straightforward reading of Rule 23. That is at odds with the spirit of the Seventh Amendment. A right to a trial by jury only if a judge believes a plaintiff has satisfied the burden of persuasion is no meaningful right at all. *See* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 1011-12; *see also* The American Law Institute, Principles of the Law on Aggregate

Litigation § 2.6, Reporters' Notes, Comment b. (2010) ("Wholesale displacement of [summary judgment] principles by the lesser threshold of a mere preponderance of the evidence – the standard prescribed for the class certification setting – threatens an unwarranted intrusion by the court upon the role of the factfinder at trial.") (citing Nagareda, 84 N.Y.U. L. Rev. at 140, 149).

Moreover, as this Court has long held, when a party seeks equitable relief – and class certification is a form of equitable relief – the judge should await and abide by the jury's findings. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962); *Bigelow Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). Given how deeply into the merits Petitioners believe a court should delve at class certification, they could well be suggesting a change in doctrine that would violate the Seventh Amendment. *See* Davis & Cramer, *Politics of Procedure*, 17 Geo. Mason L. Rev. at 1010-15.

3. Benefits of Collective Action: Petitioners' Proposal Would Undermine Efficiency and Accuracy

Adjudication of antitrust cases on a class basis can have various salutary effects. It can make litigation far more efficient by resolving issues once for a large number of class members. It also can improve the measurement of a defendant's liability for reasons both subtle and obvious, including by allowing a statistical approach to damages that is far more

account for 85% of all antitrust *Daubert* challenges). If anticipated costs really drove defendants to settle, Petitioners would be taking the exact opposite position – arguing for a standard at class certification that is less taxing rather than more taxing on the court and the parties.

Indeed, if many defendants were actually given a choice between defending individual lawsuits or a single class action, they would very likely choose the latter. But they are not. They know that if class certification is denied then the vast majority of the members of the proposed class will have no ability to protect their rights under the antitrust laws at all. That does not by itself provide a reason to certify a class in this case. The requirements of Rule 23 must of course be honored. But it does provide a firm basis not to depart from settled precedent and make the standard for certifying a class in an antitrust case ever more stringent, and the process ever more expensive. This view should be properly weighted against the view expressed by Petitioners.

CONCLUSION

For the foregoing reasons, and those set forth in Respondents' brief, the judgment of the court of appeals should be affirmed. *Amici* recognize that this Court may address only *how* plaintiffs must make their showing at class certification, not *what* showing plaintiffs must make. *Amici* nevertheless respectfully

likely to prove accurate than anecdotal evidence – or a "he said, she said." Given the expense of experts and statistical analyses, and the limits courts may impose on discovery, anecdotal evidence often is the only practical option in individual litigation. Assessing the overall impact of anticompetitive conduct on prices is a superior way to understand the effects of an antitrust violation. The alternative may be trying to determine how negotiations would have proceeded on an individual basis if the conduct had never occurred. *See generally* Joshua P. Davis, *Class-Wide Recoveries*, Geo. Wash. L. Rev. (forthcoming 2013-14), *available at* http://ssrn.com/abstract=1768148.

In various ways, Petitioners' proposal would undermine these benefits in efficiency and accuracy. First and foremost, it would make class litigation more costly. The more plaintiffs must prove to certify a class, the more discovery that must be taken, the more involved the expert analysis must be, and the more time courts and parties must dedicate to resolving class certification. Adding routine *Daubert* motions as part of the class certification process would further undermine efficiency. *Cf.* James Langenfeld & Christopher Alexander, Daubert *and Other Gatekeeping Challenges of Antitrust Experts*, 25 ANTITRUST 21, 23, 25 (Summer 2011) (reporting on empirical study suggesting that "antitrust experts are subject to a disproportionately high rate of [*Daubert*] challenges" compared to other areas of the law and determining that plaintiff damages and liability experts

submit this brief for two reasons: (1) to help identify various issues, some of them subtle, regarding the traditional burden courts have placed on plaintiffs at class certification and (2) to suggest that policy considerations do not support upsetting longstanding doctrine and imposing a greater burden on plaintiffs to protect antitrust defendants from undue pressure to settle.

Respectfully submitted,

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October 2, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

OCT 2 - 2012

No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, *et al.*,

Petitioners,

v.

CAROLINE BEHREND, *et al.*,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE, PUBLIC JUSTICE, P.C., AND AARP AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice (AAJ) is a voluntary national bar association whose members primarily represent plaintiffs in civil actions. AAJ is committed to the First Amendment value of providing access to courts for the redress of grievances and the Seventh Amendment value of dispute resolution through trials by juries. AAJ appears here to address the need for relatively inexpensive mechanisms for the resolution of disputes involving many victims of misconduct by large entities.

Public Justice, P.C. (Public Justice) is a national public interest law firm dedicated to pursuing justice for the victims of corporate and government abuses. Public Justice specializes in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims' rights, workers' rights, the preservation of the civil justice system and the protection of the poor and powerless. Public Justice regularly represents consumers and employees in class actions, and its experience is that the class action device often represents the only meaningful way that individuals can vindicate important legal rights. Public Justice is gravely concerned that the arguments advanced by Petitioner in this case would, if adopted, eviscerate the only remedy available for large numbers of individuals who have each suffered only a small harm as a result of corporate misconduct.

AARP is a non-partisan, non-profit organization. As the largest organization dedicated to protecting the interests of people age 50 and older,

AARP is greatly concerned about fraudulent, deceptive, and unfair corporate practices, many of which have a disproportionate impact on older people. AARP thus supports laws and public policies designed to protect people and to preserve the legal means for people to seek redress when they are injured by such practices. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools. While many older people lose large amounts of money to such practices, many others lose relatively small amounts or are subjected to practices which violate statutes that provide low monetary remedies. These losses nevertheless are significant. Moreover, even small losses may accumulate into huge ill-gotten gains for corporations which may have thousands or even millions of customers, each subject to the same harmful practices. Meaningful protection in the marketplace requires access to effective redress through class action litigation. Consumers face a severe disadvantage in bringing suits against large corporations. AARP is interested in the Court's ruling because of the impact it will have on consumers' access to the courts.[1]

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[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amici* disclose that no counsel for a party wrote any part of this brief, nor did any person or entity other than *amici*, their members, or counsel make a monetary contribution to its preparation.

INTRODUCTION AND SUMMARY OF ARGUMENT

In interpreting the predominance requirement of Rule 23, the supposed truism that class certification creates an *in terrorem* effect on defendants should not be used as a guide. No empirical evidence supports the current existence of such an effect. Twenty years ago some empirical evidence, highly criticized, suggested such an effect might have been manifested in securities cases. That concern was considered and addressed by Congress in 1995 in the Private Securities Litigation Reform Act (PSLRA).[2] Several serious scholars and judges, writing before the millennium, propounded serious theoretical arguments suggesting that an effect might exist. Subsequent serious scholarship demonstrates that their concerns have been addressed or were unwarranted.

Both theoretical arguments and empirical evidence regarding the purported effect were considered for all cases in the Rules Enabling Act[3] process and were addressed by a 1998 amendment authorizing interlocutory appeals of class certification decisions. Neither rulemakers nor Congress chose to address the issue by imposing greater evidentiary hurdles in Rule 23(b)(3), choosing instead to continue to vest discretion in trial judges regarding such matters. That discretion is valued.[4] The Court should take care not to

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[2] Pub. L. 104-67, 109 Stat. 737 (1995).

[3] 28 U.S.C. §§ 2071-2077 (1998).

[4] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) ("The trial court, well-positioned to decide which facts and legal arguments are most important to each

supplant the rulemaking process by writing into the rules burdens not adopted there. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) ("[T]hat is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.").

The Court's interpretation of Rule 23 should be guided by the policy "'at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights,'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see also id.* at 629 (Rule 23 should be interpreted "with the interests of absent class members in close view."), and by Rule 1, which imposes on district courts a duty to find "just, speedy, and inexpensive" ways to adjudicate meritorious claims and which "governs" the scope of the Federal Rules of Civil Procedure. *Amchem*, 521 U.S. at 681. *See also Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992). These values counsel care in increasing evidentiary burdens and litigation costs in the many class actions in which simpler types of evidence can demonstrate that the requirements of Rule 23 are met. For example, there is little need for complex evidence that damages can

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Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23."); *In re Initial Public Offerings Securities Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("To avoid the risk that a Rule 23 hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation, a district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements.").

be proved on a classwide basis when the issue is the legality of the levy of a monthly charge, over a defined period, against each class member. *See, e.g., In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2009 WL 435111, at *8 (D. Kan. Feb. 20, 2009), *aff'd.*, 619 F.3d 1188 (10th Cir. 2010) ("At trial, the court instructed the jury that, if it found for plaintiffs on their claim for breach of contract, 'the proper measure of damages is the amount by which the USF charges collected by AT&T from its California residential customers exceeded the amount AT&T was required to pay into the Universal Service Fund for those customers.'").

Class actions often present claims that are "not economically feasible" to bring individually and claimants often would be "without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). The Court should not impose burdens that impede Rule 23 from playing its role in discharging one of the "first duties of government": providing access to courts for meritorious claims. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

ARGUMENT

I. THE PERSISTENT BUT CHIMERICAL IDEA THAT AN *IN TERROREM* EFFECT REQUIRES HIGHER PROCEDURAL HURDLES TO CLASS CERTIFICATION SHOULD NOT BE USED AS A GUIDE TO INTERPRETING RULE 23.

The Court here is urged to consider the purported *in terrorem* effect of class certification in interpreting the predominance requirement of Rule

23. It should decline the invitation. To any extent the effect ever existed it has been ameliorated by the PSLRA and by the creation of Rule 23(f).

Without invocation of empirical evidence this Court has endorsed the idea that settlement pressure in certain class action litigation leads to "legalized blackmail," *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 n.9 (1980) (citing Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. Cal. L. Rev. 842 (1974)), and has relied on the existence of an *in terrorem* effect. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of '*in terrorem*' settlements that class actions entail . . .").

Similarly, with little evidentiary support, Judge Posner influentially castigated "blackmail settlements." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995). *See* Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 Baylor L. Rev. 681, 686 (2005) (describing the decision and its influence). Again, without evidentiary foundation, courts have invoked an *in terrorem* effect when their real concerns were about potentially coercive effects of substantive law, not of rules of procedure.[5]

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[5] Judge Easterbrook has criticized this practice. "[I]t is not appropriate to use procedural devices to undermine laws of which a judge disapproves. . . . While a statute remains on the books . . . it must be enforced rather than subverted.") *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (Easterbrook, J.) (internal citations omitted).

Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification,* 79 Geo Wash. L. Rev. 324, 362-63 (2011)[6]. The court below relied on the purported effect in deciding this case. *Behrend v. Comcast Corp.*, 655 F.3d 182, 213 n.17 (3d Cir. 2011) (Jordan, C.J., concurring in part and dissenting in part) (citing Circuit precedent, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008)). The existence of an *in terrorem* effect has become a ubiquitous belief.

Ubiquity does not equal truth. Evidence does not support the current existence of an *in terrorem* effect. In the early nineties some empirical evidence,[7] highly criticized,[8] suggested the existence of an *in terrorem* effect in securities litigation. Congress acknowledged that evidence and addressed the underlying concern in the 1995 Private Securities Litigation Reform Act., H.R. Rep. No. 104-369, at 31-32 (1995) (Conf. Rep.), *reprinted in* 1995

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[6] Professor Marcus is Associate Reporter for the Advisory Committee on Civil Rules. *Id.* at n.1.

[7] Notably, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991). Alexander drew conclusions from a sample of six class actions.

[8] *See, e.g.*, James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 Ariz. L. Rev. 497, 503 (1997) (questioning whether "it is appropriate . . . to draw such a sweeping conclusion from a sample [so] slender"); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2083-84 (1995); Joel Seligman, *The Merits Do Matter*, 108 Harv. L. Rev. 438, 448 (1994).

U.S.C.C.A.N. 730, at 730-31. Whatever effect might have existed before the PSLRA appears to have vanished.[9] The best available evidence suggests the effect has never played a significant part in non-securities class adjudication and does not justify use of the supposed effect in interpreting the predominance requirement of Rule 23. Doctrine suggests the same result, as the Congressionally created rulemaking process considered the issue of coercive settlement and chose to address it by adopting Rule 23(f) and not by amending Rule 23(b)(3).

The Federal Judicial Center studied coercive settlements as Congress considered the 2005 Class Action Fairness Act.[10] The FJC's findings regarding the magnitude of settlements in certified class actions seriously undermine the belief in an *in terrorem* effect. The FJC study analyzed cases initially removed to federal court and compared results of cases staying in federal court with cases remanded to state court. In cases in which classes were certified, 33 percent of the cases in state courts and 44 percent in federal courts involved monetary recoveries (many class actions seek primarily

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[9] Post PSLRA, class certifications are falling, in general. *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 606 (2006) (rate of certification class actions between 1992-1994 (pre-PSLRA) declined by about one-third for the period 1999-2002 (post-PSLRA)). *See also* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. Kan. L. Rev. 775, 789-90 (2010) (class certification motions declining).

[10] Pub. L. No. 109-2, 119 Stat. 4 (2005).

injunctive relief), with the median recovery, by judgment or settlement, being $850,000 in state court and $300,000 in federal court. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 Notre Dame L. Rev. 591, 639 & Table 15 (2006) (hereinafter "2006 FJC Report"). Such numbers seem unlikely to induce terror in the kinds of business organizations often involved in such claims[11] and are well within the bounds for which companies typically insure themselves.[12]

Those numbers are consistent with a 1996 FJC study designed in part to address the *in terrorem* question. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf (hereinafter "1996 FJC Report").That study reported median settlements (no judgments, as in the later study) in four high-volume districts based in Philadelphia, Miami, Chicago, and San Francisco. In non-securities cases settled after class certification, the median settlement amounts

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[11] Last year the smallest Fortune 500 Company had revenues of almost $5 billion. http://money.cnn.com/magazines/fortune/fortune500/2012/full_list/401_500.html

[12] Lynn M. LoPucki, *The Death of Liability*, 106 Yale L.J. 1, 46 n.202 (1996) (citing Tillinghast-Towers Perrin and the Risk and Insurance Management Society, *1995 Cost of Risk Survey* 1, 69 (1995)) (in 1995 firms with revenues of $100 million to $500 million carried insurance of $31 million to $50 million, enough to cover most class action settlements even today).

distributed to class members – amounts that can be compared to the numbers described in the 2006 study, and similar to them in nominal dollars – were: Philadelphia, $0; Miami, $123,973; Chicago, $44,639; San Francisco, $1,100,000.[13] Average awards per class member ranged from $315 to $528, *id.* at 13, very similar, in nominal dollars, to the median awards of $350 to $517 reported in the 2006 study. 2006 FJC Report, *supra,* at 639, Table 15.

Professor Brian T. Fitzpatrick of Vanderbilt University studied all class action settlements approved by federal judges in 2006-2007. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards,* 7 J. Empirical Legal Stud. 811 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442108. In non-securities cases, he found median settlements "bunched around a few million dollars." *Id.* at *21 & Table 6. These amounts include attorney fees and are comparable to amounts found in the 1996 FJC Report, *see* n.13, when the 1996 numbers are adjusted to 2007 dollars.[14] The numbers Fitzpatrick reports are slightly higher than those found by the FJC, but, again, not of a magnitude sufficient to give

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[13] These numbers are net distributions. 1996 FJC Report, *supra*, at 166, Table 11. They exclude administrative costs and attorney fees. Administrative costs are not separately reported but attorney fees are. Adding attorney fees, the respective numbers are: Philadelphia, $225,000; Miami, $299,000; Chicago, $384,000; San Francisco, $3,100,000. *Id.*

[14] Taking the FJC numbers as 1995 dollars and adjusting them to 2007 dollars using a Department of Labor calculator, http://www.bls.gov/data/inflation_calculator.htm, the respective numbers are: Philadelphia, $306,000; Miami, $407,000; Chicago, $522,000; San Francisco, $4,200,000.

alarm. Notably, Professor Fitzpatrick found that non-securities cases accounted for only about one-fourth of class action settlement monies.[15]

The 1996 FJC study addressed dispositive motions practice as an indicator of whether defendants felt coercive pressure, reasoning that frivolous claims do not survive dispositive motions. 1996 FJC Report, *supra* at 32. It reasoned also that if rulings on dispositive motions were made promptly, defendants have opportunities to resolve merits issues without undue settlement pressure. *Id.*

It found that dispositive motions were used in two-thirds of cases, *id.*, and that dispositive motions generally were ruled on in timely fashion. *Id.* at 33. It found:

> For at least one-third of the cases in our study, judicial rulings on motions terminated the litigation without a settlement, coerced or otherwise. The settlement value of other cases was undoubtedly influenced by rulings granting motions for partial dismissal or partial summary judgment and by rulings denying such motions. Such merits-related influences on settlement value, however, seem not to fall within the broadest definition of a strike suit.

1996 FJC Report, at 34. Settlement pressure derived from a merits-based determination is not a reason to constrain, through a narrow reading of Rule 23, the

---

[15] 24 percent in 2006 and 27 percent in 2007. Fitzpatrick, *supra* at *18, Table 4.

number of plaintiffs who might assert the meritorious claim. *See supra* notes 5-6 and accompanying text.

The 1996 study also analyzed class certification itself as a potential cause of *in terrorem* settlement pressure, and concluded:

> Judicial rulings and active case management, including the setting of trial dates and holding pretrial conferences (see Table 19), cannot be said to eliminate the possibility of coerced settlements, but their prevalence in this study of class actions greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency.

1996 FJC Report, at 61. That kind of active case management is ensconced as standard practice. *See Manual for Complex Litigation* (Fourth) § 21 (2004); and Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d ed. 2010), both Federal Judicial Center publications.

One court, responding to an assertion that the coercive effect of a possible $1.7 million in liability was a reason not to certify a class, found that the rationales about coercion put forward, that "class actions are not triable, defendants [sic] exposure to valid small claims is increased, weak but large claims coerce compromise and class actions inherently coerce settlements," were "entirely

contradictory and not supported by empirical evidence." *Travel 100 Group, Inc. v. Empire Cooler Service Inc.*, No. 03 CH 14510, 2004 WL 3105679, at *7 (Ill. Cir. Oct. 19, 2004). That court relied on a definitive and detailed doctrinal and empirical analysis of the *in terrorem* effect published ten years ago by Professor Charles Silver,[16] *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003). No subsequent empirical evidence is inconsistent with Silver's analysis and no doctrinal work challenges it in any significant way.

Silver identifies the primary proponents of the *in terrorem* effect as Professor Milton Handler and Judges Henry Friendly, Richard Posner, and Frank Easterbrook. All primarily addressed securities cases and all except Easterbrook wrote primarily before the enactment of the PSLRA. Silver describes Judges Friendly, Posner, and Easterbrook as "towering figures in American jurisprudence" who "cannot be dismissed as ideologues." *Id.* at 1361. Silver identifies "four versions of the blackmail thesis," and certain variations among the versions:

> One contends that blackmail occurs because class actions are not triable.

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[16] Professor Silver is the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, where he also serves a Co-Director of the Center on Lawyers, Civil Justice, and the Media. He received an M.A. in political science at the University of Chicago and a J.D. from the Yale Law School. From 2003 to 2010, he served as an Associate Reporter on the American Law Institute's Project on the Principles of Aggregate Litigation. Federal and state judges, as well as leading treatises, have cited his work. *Silverman v. Motorola, Inc.*, No. 07 C 4507, 2012 WL 1597388, at *4 n.3 (N.D. Ill. May 7, 2012).

> Three contend that blackmail occurs because class actions are triable.
>
> The three triability-based theories treat claim size differently: One says blackmail occurs when claims are small; one says that it occurs when claims are large; and one says that it occurs regardless of claim size.

Id. (footnotes omitted).

Silver shows that Handler's concern is primarily that class action cases cannot be tried, and demonstrates that "federal judges have addressed Handler's manageability concerns." *Id.* at 1365. He notes, though, that by doing so, "[T]hey have brought Friendly's fear of enormous trial judgments to life. . . . Few things unsettle a defendant like the knowledge that a jury soon will decide the outcome of a lawsuit involving thousands of claims and millions of dollars in liability." *Id.* This kind of pressure, however, is not coercive in any way that should concern interpretation of Rule 23. It results from a decision of Congress to authorize class actions and a decision of the judiciary that a meritorious claim is before it. The fear of losing at trial, Silver notes:

> [P]oses no challenge to consent. It is a reason for thinking that a defendant is right to settle, not for thinking that a defendant is coerced.
>
> This point is fundamental. All American civil justice systems generate settlement pressure by forcing parties to risk losing at trial. Few judges complain about this, even though fear of

> losing at trial typically generates cheap settlements because plaintiffs and their lawyers are more risk averse than defendants.

Id. at 1366-67. *See supra* notes 5-6 and accompanying text.

Silver identifies efficiency as a key concern of Judge Posner and concedes that a plausible argument regarding efficiency can be made:

> By comparison to a series of small trials, a class action that plays on a defendant's risk aversion is likely to overdeter. Because the purpose of litigation is to encourage efficient conduct outside of the courthouse, a class action is undesirable when claims practicably can be tried individually.

Id. at 1375-76. That concern, however, is met already in Rule 23(b)(3), which requires a finding that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." It does not provide a basis for increasing the burden, also imposed by the rule, of demonstrating predominance.

Judge Easterbrook "offered securities class actions as prime examples of lawsuits in which blackmail settlements occur," *id.* at 1382, a concern that has been addressed in the PSLRA. Another concern of Easterbrook, according to Silver, is that the "'imperfect alignment of managers' and investors' interests leads defendants to pay large amounts to settle class actions containing weak claims." *Id.* at 1382 (quoting *West v. Prudential Sec., Inc.*, 282 F.3d

935, 937 (7th Cir. 2002) (Easterbrook, J.)). Silver, in response, poses this question: "When class actions are procedurally proper, why should judges deny certification to protect shareholders from opportunistic conduct by their own agents? The wisdom of allowing defects in business arrangements to dictate the choice of litigation procedures is not self-evident." Silver, *supra* at 1383. It also interferes with judgments Congress has about both substantive law and the rules.

Coincident with consideration of the PSLRA by Congress, and pursuant to the Rules Enabling Act, the Civil Rules Advisory Committee analyzed the purported *in terrorem* effect:

> Advocates for reform advised the Committee that in many cases the certification decision was dispositive of the litigation; once a class is certified and the stakes of the litigation are magnified, whatever the merits of the claim, the defendant has little choice but to bow to the overwhelming pressure to settle.

Report of the Civil Rules Advisory Committee to the Standing Committee, at 28 (May 14, 2001), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2001.pdf. "To address this problem and foster the growth of appellate law, the Committee proposed Rule 23(f)" authorizing interlocutory appeals of class certification decisions. *Id.* The proposed rule was vetted by Congress and adopted in 1998. The Advisory Committee note accompanying the rule specifically alludes to the *in terrorem* concern: "An order granting certification . . .

may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."

In practice Rule 23(f) has become a significant safety valve for persons opposing class certification motions. Professor Silver, on the basis of then-available empirical evidence, in 2003 called the rule "a one-way ratchet for defendants." Silver, *supra*, n.8. The description remains accurate. Defendants now take 69 percent of the appeals under Rule 23(f) and obtain reversals in 70 percent of those decisions. Robert H. Klonoff, *The Decline of Class Actions,* 90 Wash. U.L. Rev. ___, *14, App. A (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985.

The appealability rule was formulated through the rulemaking process, with the assent of Congress, and took into account the magnitude of claims that could be involved in class certification decisions and the pressure they could bring to bear on those facing liability. When the rulemakers again considered Rule 23, culminating in amendments enacted in 2003, they noted they were dealing with issues they had not already addressed in the 1996 amendments[17]

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[17] The drafts in the agenda book are the proposals presently identified as candidates for continued work. The criteria for such candidates are: (1) proposals for rule changes to respond to problems identified either in the lengthy last round of class action rulemaking in the 1990s or in submissions to the Committee since then; (2) that do not essentially repeat approaches that did not succeed in the last round of class action rulemaking; and (3) that could feasibly survive the process for rule enactment.

and that they were choosing to focus "on the process by which class actions are litigated, rather than on changing the standards for certifying cases as class actions."[18]

The choice of the rulemakers to address the concern about *in terrorem* effect through appealability, and not to address the concern by divesting trial courts of discretion regarding substantive burdens to be borne in the predominance inquiry, was purposeful and should be viewed as legislative, *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 472 (1978) (this kind of action "is plainly a legislative, not a judicial, function"); *see also Blackie v. Barrack*, 524 F.2d 891, 899 (9th Cir. 1975) ("[t]he fairness of the pressure . . . is not a question for [judges] to decide. The fact is that Congress, by authorizing . . . Rule 23(b)(3), created a vehicle to put small claimants in an economically feasible litigating posture."), and is due deference from this Court. *Leatherman*, 507 U.S. at 168-69. *See also Jones v. Bock*, 549 U.S. 199, 217 (2007) ("[W]e have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."). Deference is due especially when, to address a problem, the rulemaking process has expanded the jurisdiction of the Courts of Appeals, Congress having designated "rulemaking, not expansion by court decision,' as the

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Memorandum from Lee H. Rosenthal, Ed Cooper, and Rick Marcus to the Committee on the Federal Rules of Civil Procedure (Feb. 26, 2001), *in* Agenda Book, Committee on the Federal Rules of Civil Procedure March 12, 2001, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2001-03.pdf.

[18] *Id.*

preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 609 (2009).

Deference should be afforded not only for doctrinal reasons, but for practical ones. "[T]he rulemaking process has important virtues. It draws on the collective experience of bench and bar . . . and it facilitates the adoption of measured, practical solutions." *Id.* (internal citation omitted). The rulemaking process is a doctrinally more appropriate and institutionally more suitable forum than this Court for wrestling with the issues at hand:

> [T]he argument is . . . properly addressed to Congress. We have no reliable knowledge, and no good means of acquiring any, about the present nature and number of class action settlements, and of how that experience compares with individual lawsuits of the same type, or pressing claims of similar magnitude. Thus, we have no means of deciding whether the present hue and cry of "blackmail" in fact reflects an abnormally high incidence of unfairly coerced settlements, or is rather the pained outcry of defendants whose previously advantaged litigating position has been undermined, and who must now confront small claimants (who have been given the capacity to exert pressure proportionate to the magnitude of the total injury occasioned by defendant's alleged violation of the law) on more equal grounds.

Blackie, 524 F.2d at 899-900.

II. ANY PRONOUNCEMENTS REGARDING EVIDENTIARY BURDENS ON MOVANTS FOR CLASS CERTIFICATION SHOULD BE FASHIONED WITH REGARD TO CLAIMS WHICH EFFECTIVELY CANNOT BE LITIGATED INDIVIDUALLY BECAUSE OF COSTS BUT WHICH CAN BE LITIGATED EFFICIENTLY AS CLASS ACTIONS.

This Court's jurisprudence appropriately reflects particular sensitivity to class action claims that are small in relation to costs of litigating them individually. *See, e.g., Amchem*, 521 U.S. at 617; *Deposit Guar. Nat'l Bank*, 445 U.S. at 338-339; *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985) ("[T]his lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."). State doctrine reflects the same sensitivity to providing access to courts. *See, e.g., Weld v. Glaxo Wellcome Inc.*, 746 N.E.2d 522, 532 (Mass. 2001) ("This case presents a classic illustration of the policies of judicial efficiency and access to courts that underlie the consumer class action suit: it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court."); *Darling v. Champion Home Builders Co.*, 638 P.2d 1249, 1252 (Wash. 1982) ("Class actions . . . establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits. Accordingly, they improve access to the courts." (citation omitted)). The Court should take care in answering

the Question Presented that it does not impose burdens where they are not needed and where they would do much harm.

Many consumer class actions bear little resemblance to the complex antitrust claim at issue here. For example, many consumer claims seek make-whole relief that is calculable ministerially. *See, e.g., In re Community Bank of N. Va.*, 418 F.3d 277, 306 (3d Cir. 2005) ("Whether an individual borrower has a viable TILA [Truth in Lending Act] or HOEPA [Home Owner's Equity Protection Act] claim may be determinable by conducting simple arithmetic computations on certain figures obtained from the face of each loan's TILA Disclosure Statement."); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 419 (5th Cir. 2004) ("The policy variables are identifiable on a classwide basis and, when sorted, are capable of determining damages for individual policyowners; none of these variables is unique to particular plaintiffs. The prevalence of variables common to the class makes damage computation 'virtually a mechanical task.'" (footnote and citation omitted)); *Carnegie v. Mutual Sav. Life Ins. Co.*, No. Civ.A.CV-9953292NE, 2004 WL 3715446, at *16 (N.D. Ala. Nov. 24, 2004) ("Class members are 'automatically entitled to the difference between what a black and a white paid for the same policy,' and that difference in fact has been calculated using standardized formulas based upon information kept by Mutual Savings in the normal course of business. No subjective evidence was or will be required to determine each class member's claim for damages." (internal citation omitted)); *Chisolm v. TranSouth Fin. Corp.*, 184 F.R.D. 556, 566 (E.D. Va. 1999) (damages to each class member could be calculated by entering objective data into a

spreadsheet). In *Chisolm* the trial court was comfortable accepting representations of counsel, and under the circumstances that comfort seems wholly rational. Proving to a trial court that damages are readily calculable does not necessarily require expert testimony at all, can be quite simple, and should remain that way for appropriate cases.

Damages in more complex cases can be proven in other ways and, critically, need not be proven at the same time as all other issues. Courts have wide discretion to bifurcate trials under Rule 42(b). "The judge can bifurcate (or for that matter trifurcate, or slice even more finely) a case at whatever point will minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication." *Hydrite Chemical Co. v. Calumet Lubricants, Co.*, 47 F.3d 887, 891 (7th Cir. 1995). *See also Manual for Complex Litigation* (Fourth) § 11.632 (2004) ("Whether the litigation involves a single case or many cases, severance of certain issues for separate trial under Federal Rule of Civil Procedure 42(b) can reduce the length of trial, particularly if the severed issue is dispositive of the case. . . ."). Cases can be, and are routinely, tried according to trial plans crafted by experienced judges and practitioners. *Manual for Complex Litigation* (Fourth) § 21.141 (2004) ("A trial plan often assists in identifying the relationship between individual and common elements of proof, but Rule 23 does not operate in a vacuum. Bifurcation and severance under Rule 42 are available as tools that might make a case more manageable by separating out discrete issues for a phased or sequenced decision by the judge or at trial."). District court judges have enormous experience in handling the practical elements of presentation and evaluation of evidence

and proof and have been effectively managing litigation in varied and innovative ways for decades. *See In re Master Key Antitrust Litig.*, 528 F.2d 5, 15 (2d Cir. 1975) ("bifurcated trials have frequently been employed with great success. even in antitrust suits." (citations omitted)). This flexibility the rules provide district court judges should not be constrained by broad interpretation of Rule 23.

Class actions "can be the Colt pistol of the little folks, i.e., in appropriate cases, they provide the key to the Temple of Justice for those who could not possibly afford an individual action against an economically advantaged defendant." *In re Prempro*, 230 F.R.D. 555, 574 (E.D. Ark. 2005) (Wilson, J.). Broad pronouncements from this Court indiscriminately increasing evidentiary burdens at the class certification stage for all kinds of cases could render meritorious cases not viable. *See* Marcus, *Reviving Judicial Gatekeeping*, 79 Geo. Wash. L. Rev. at 359-60. Any pronouncements this Court makes must account for the diverse situations encountered in class action litigation and must give due regard to the role of Rule 23 in fostering the fundamental constitutional right "to appeal to courts . . . for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011).

CONCLUSION

This Court should affirm the decision below.

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AMICUS CURIAE BRIEF

No. 11-864

In The Supreme Court of the United States

COMCAST CORPORATION, *et al.*,

Petitioners,

v.

CAROLINE BEHREND, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is important to Cato because it concerns the misapplication of class action procedures to alter or evade the burdens of substantive law, raising substantial concerns regarding due process and abuse of the class action mechanism.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011), was perfectly clear that, because "[c]ommonality requires the plaintiff to demonstrate that the class members have

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this *amicus* brief are filed with the Clerk.

suffered the same injury" and that their injury is "capable of classwide resolution," the trial court must undertake a "rigorous analysis" of compliance with the requirements of Rule 23. Nonetheless, many lower courts have fallen far short of enforcing that standard, falling back to the pre-*Dukes* fallacy that courts must avoid a critical examination of evidence and evidentiary issues in order to avoid making a ruling on the "merits."

The Third Circuit's decision provides just one example of the ways that lower courts have deviated from the principles of *Dukes* to certify class actions despite the absence of evidence demonstrating that Rule 23's requirements have been met. This practice threatens significant prejudice to both defendants and class members, particularly those absent from litigation, and compromises the basic requirements of due process. And it illustrates the need for this Court to hold, in unequivocal language, that a class action plaintiff must present properly *admissible* evidence to satisfy the burden of proving that his claims are susceptible to common and predominating class-wide proof.

I. The problem of lower courts' certifying class actions in the absence of admissible evidence of commonality is not at all limited to the antitrust context. In just the one year since *Dukes*, the lower courts have repeatedly addressed the issue of the plaintiff's burden to present admissible evidence in support of class certification, reaching conflicting decisions. In some instances, as in the instant case, plaintiffs have

been able to circumvent *Dukes* through certification decisions that effectively relieve the plaintiff of his burden to "affirmatively demonstrate his compliance with [Rule 23]." *Dukes*, 131 S.Ct. at 2551. The result has been to certify classes even where class members' claims are not necessarily susceptible to class-wide resolution.

II. *Daubert* is the appropriate standard for the admission of expert evidence at the class certification stage. Any lower standard would be inconsistent with *Dukes*' "rigorous analysis" requirement for compliance with Rule 23 and risks both substantial prejudice to defendants and the certification of classes that do not warrant Rule 23's narrow exception from the usual rule that litigation be conducted on behalf of named parties only. To avoid those results, the Court should clarify that, although there may be some overlap with the "merits," a full *Daubert* inquiry into the reliability and admissibility of expert testimony is required at the certification stage.

Accordingly, the Court should reverse the decision of the court of appeals and hold that Rule 23 and basic principles of due process require that evidence presented at the class certification stage be subject to the same standards as evidence presented at trial.

ARGUMENT

I. DESPITE *DUKES*, MANY LOWER COURTS STILL DECLINE TO SUBJECT CLASS CERTIFICATION TO "RIGOROUS ANALYSIS"

"[L]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried," *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring), this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), continues to stalk the lower courts' decisions certifying classes compliance with the basic requirements of Rule 23. While many courts over the years summoned *Eisen* for the proposition that a court could not consider any issue at the class certification stage that happened to overlap with a question on the merits, the Court's decision last year in *Wal-Mart Stores, Inc. v. Dukes* should have killed it off once and for all. *See* 131 S.Ct. at 2552 n.6. But *Eisen* lingers on in the reluctance of some federal courts to subject expert evidence submitted at the class certification stage to the same scrutiny, under the same standards, that prevail at trial. Its continued presence undermines compliance with *Dukes*.

A. *Eisen's* Legacy Continues to Prevent Courts from Undertaking "Rigorous Analysis" of Evidence at the Class Certification Stage

It is now well-settled that "certification is proper only if 'the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Dukes*, 131 S.Ct. at 2551 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Such rigorous analysis may require the court "to probe behind the pleadings," *Falcon*, 457 U.S. at 160-61, and will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Dukes*, 131 S.Ct. at 2551. This is because the determination of whether a class can be certified "generally involves" considering both factual and legal issues that make up the plaintiff's complaint. *Id.* at 2552; *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

It is all well and good that *Eisen* is no longer taken to mean that a court cannot consider the merits of a case as necessary when determining if a case is appropriate for class treatment. But as the Third Circuit's opinion below reveals, a vestige of the discredited view of *Eisen* remains in courts' reluctance to evaluate expert evidence submitted at the class certification hearing under the standard set forth in

Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).[2]

This approach was routine before *Dukes*. *See, e.g., In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229, 234 (D. Minn. 2001) ("On a motion for class certification, the Court cannot, and indeed should not, engage in [*Daubert*] analysis."); *Vickers v. Gen. Motors Corp.*, 204 F.R.D. 476, 479 (D. Kan. 2001) ("The court recognizes that an analysis of expert opinion of the type explained in *Daubert* . . . is not required at the class certification stage."); *Cole v. ASARCO Inc.*, 256 F.R.D. 690, 696 n.3 (N.D. Okla. 2009) ("[A] *Daubert* analysis of expert opinion is not required at the class certification stage").

But this Court did not have the opportunity in *Dukes* to reach the issue of whether evidence submitted at the class certification stage of a proceeding must meet the *Daubert* standard because the expert testimony submitted was inadequate to satisfy even a lesser standard. *Dukes*, 131 S.Ct. at 2553-54 (expert's testimony was "worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of

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[2] In *Daubert* and its progeny, this Court held that a trial judge serves as a gatekeeper to preclude expert testimony that is not based on scientific knowledge. *See Daubert*, 509 U.S. at 589-90. In order to determine whether testimony is admissible as evidence under *Daubert*, a court must consider certain factors to determine whether the reasoning or methodology underlying the testimony is scientifically valid and applies to the facts at issue. *Id.* at 593-95. Federal Rule 702 has since been amended in an attempt to codify these factors. *See* Fed. R. Evid. 702.

discrimination'"). *Dukes* did, however, strongly suggest that *Daubert* must be satisfied at the class certification stage: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so. . . ." *Dukes*, 131 S.Ct. 2553-54 (citation omitted).

Nonetheless, *Eisen's* legacy persists today in decisions by federal courts that have not understood that the "rigorous analysis" demanded at the class certification stage requires that expert evidence actually be admissible. The Third Circuit's decision in this case may be among the most extreme examples, but other courts have also continued to express reluctance to delve too far into the admissibility of expert testimony at the class certification stage.[3] The Eighth Circuit, for example, has held that a full *Daubert* analysis is not necessary at the class certification stage, and has instead sanctioned a district court's use of a limited, "tailored *Daubert*" analysis. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011). The court rationalized the use of a less-than-complete *Daubert* analysis because

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[3] *Cf. Marcus v. BMW of N. Am., LLC*, No. 11-1192, ___ F.3d ___, 2012 WL 3171560, at *14 (3d Cir. Aug. 7, 2012) (in context of consumer fraud, breach of warranty, and breach of contract claims, weighing "conflicting expert testimony at the certification stage is not only permissible" but "may be integral to the rigorous analysis Rule 23 demands").

"[t]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker." *Id.* And, following *Zurn*, the District of Minnesota recently endorsed an "adapted" *Daubert* analysis at class certification that "only scrutinizes the reliability of expert testimony in light of the criteria for class certification." *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090, 2012 WL 3031085, at *6 (D. Minn. July 25, 2012) (citing *Zurn*, 644 F.3d at 614).

Notwithstanding *Dukes*, a substantial minority of the lower courts continue to hold on to an unjustified aversion to examining questions about the admissibility or reliability of the plaintiff's evidence too critically. As a result, these courts refuse to examine at the class certification stage whether expert testimony submitted in an attempt to prove the existence of common questions meets the *Daubert* standard that would govern the admissibility of the same evidence at trial.

B. The Lower Courts Have Failed To Settle on a Single Standard for the Admissibility of Evidence, Leading to Inconsistent Results

Inconsistent analysis of evidence by the courts inevitably leads to inconsistent results on class

certification. That has proven true in the year since *Dukes*.

Unlike those courts that have been reluctant to reach "merits" issues at the certification stage, others, both before and after *Dukes*, have held precisely the opposite. *See, e.g., In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001); *Gariety v. Grant Thorton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Coastal Neurology, Inc. v. State Farm Mut. Auto. Ins. Co.*, 458 F. App'x 793 (11th Cir. 2012).

More specifically, a number of appellate decisions since *Dukes* have heeded this Court's guidance regarding the application of the *Daubert* standard at the certification stage. For example, the Seventh Circuit recently held that where the admissibility of expert testimony "critical" to class certification is challenged, the court must conduct a full *Daubert* analysis prior to denying certification. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012). Previously, that court had required a full *Daubert* analysis of critical testimony before *granting* class certification. *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 819 (7th Cir. 2010).

Similarly, the Ninth Circuit has recognized not only the need for full *Daubert* inquiry into the admissibility and reliability of the plaintiff's expert testimony, but also a factual finding after a rigorous analysis that the plaintiff has met his or her burden

of proof that the issues are common and not individualized. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) ("Instead of judging the persuasiveness of the evidence presented [in the commonality context], the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible [in the motion to strike context]."); *see also Bolden v. Walsh Constr. Co.*, No. 12-2205, ___ F.3d ___, 2012 WL 3194593, at *3 (7th Cir. Aug. 8, 2012) ("We need not determine whether [the expert's] study should have been excluded under Fed.R.Evid. 702. It is enough to say that it does not show any common issue that would allow a multi-site class."); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489, ___ F. Supp. 2d ___, 2012 WL 2870207, at *16-17 (D.D.C. June 21, 2012) (critically analyzing and weighing credibility and admissibility of expert evidence, but without express reference to *Daubert*).

In sum, a year after *Dukes*, the lower courts are split as to one of the most basic questions regarding class certification and which the Court all but answered in its decision. Clearer guidance is necessary.

C. Because This Disarray Is Not Limited to the Antitrust Context, the Remedy Must Be Broadly Applicable

The refusal of some lower courts to evaluate the admissibility of purportedly "common" evidence

proffered by a plaintiff in support of class certification, often in the form of expert opinion testimony, is a problem that is not limited to the antitrust context, the employment discrimination context, or any other subject area. Nor is it unique to the questions regarding the existence or extent of damages. It is an issue that arises whenever a plaintiff takes the position that class certification is proper because one or more elements of a claim can be proven based on common, class-wide evidence.

Even in the year since this Court issued its decision in *Dukes*, the issue of how the trial judge should approach the admissibility issue has arisen in numerous contexts in the lower courts, with standards varying from jurisdiction to jurisdiction. *See, e.g., Marcus v. BMW of N. Am., LLC,* No. 11-1192, ___ F.3d ___, 2012 WL 3171560, at *14-17 (3d Cir. Aug. 7, 2012) (consumer fraud, involving alleged breach of warranty and breach of contract); *Messner*, 669 F.3d at 812 (Sherman and Clayton Acts); *Bolden*, 2012 WL 3194593, at *3 (race discrimination); *Ellis*, 657 F.3d at 982 (sex discrimination); *Zurn,* 644 F.3d at 612 (products liability); *Bennett v. Nucor Corp.*, 656 F.3d 802, 815-16 (8th Cir. 2011) (race discrimination); *Gray v. Hearst Commc'ns, Inc.*, 444 F. App'x 698, 701-02 (4th Cir. 2011) (consumer fraud, involving alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and deceptive trade practices); *Casida v. Sears Holdings Corp.*, No. 1:11-cv-01052, 2012 WL 3260423, at *2-3 (E.D. Cal. Aug. 8,

2012) (employment misclassification); *Madanat v. First Data Corp.*, No. CV 11-364, 2012 WL 2905931, at *3 (E.D.N.Y. July 16, 2012) (consumer fraud, involving alleged unauthorized electronic funds transfers and conversion, and seeing injunctive relief).

The lack of uniformity in the standards applied by the lower courts makes clear that further guidance by the Court should not be limited to specific types of cases or issues, but apply broadly to all class certification determinations.

II. TO AVOID PREJUDICE TO DEFENDANTS AND CLASS MEMBERS, THE SAME EVIDENTIARY STANDARD SHOULD APPLY AT THE CLASS CERTIFICATION STAGE AS AT TRIAL

A. Only *Daubert* Provides "Rigorous Analysis" of Evidence at the Class Certification Stage

Permitting courts to apply a lower standard for evidence at the class certification stage than at trial is inconsistent with the Court's approach in *Dukes*. *Dukes* echoes the Court's previous decisions holding that lower courts must engage in a rigorous analysis in determining the propriety of class certification, and further discredits those courts that have read *Eisen* to preclude even a peek at the merits at the class certification stage. But *Dukes* specifically stated that plaintiffs must *prove* the propriety of class certification, even if that means proving the issue "again at

trial in order to make out the case on the merits," 131 S.Ct. 2552 n.6, to satisfy the requirements of Rule 23 and comport with basic notions of due process. Any lower standard falls short of these obligations.

To avoid proceeding to a class trial based on inadmissible and unreliable evidence, courts should conduct a full *Daubert* analysis of proffered evidence even at the class certification stage. *See Zurn*, 644 F.3d at 630 (Gruender, J., dissenting) ("We should be concerned . . . that the case will proceed beyond class certification on the basis of inadmissible, unreliable expert testimony."); *Am. Honda Motor Co.*, 600 F. 3d at 819 (Evidence that is "not . . . reliable should not be admitted, even at this early stage of the proceedings.").

The justifications provided for applying a less stringent standard fall short of common sense. The Third Circuit's rationale that to make an admissibility determination at the class certification phase is somehow a decision on the "merits" is wrong as a matter of logic, as well as relying on a misinterpretation of precedent that this Court has already clarified in *Dukes*. And the Eighth Circuit's justification for applying a limited *Daubert* standard – the belief that a full blown *Daubert* hearing is premature before a case reaches a later stage – is not reconcilable with Rule 23's rigorous analysis standard. By definition, an analysis cannot be rigorous if it is not done at all, if it is deferred for a later ruling, or if it is completely deferential to the allegations of the plaintiff and her expert. *See West v. Prudential Sec., Inc.*, 282 F.3d 935,

938-39 (7th Cir. 2002) (a district court cannot "duck hard questions" or delegate its judicial power to evaluate evidence); *Ellis*, 657 F.3d at 982 ("the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable.").

B. Any Lower Bar for Class Certification Would Prejudice Defendants and Class Members

To avoid prejudice to defendants, as well as prejudice to absent class members who, pinning their hopes on what may be inadmissible evidence, decide to remain in a class, a full *Daubert* analysis should be required at the class certification stage of a proceeding.

As set forth in the 1966 Advisory Committee notes relating to Rule 23(b)(3): "[This Subdivision] encompasses those cases in which a class would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-03 (1966).

The text of Rule 23(b)(3) requires that the court "find," not assume, that there are questions of law or

fact common to class members that predominate. *See Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005). As one commentator has recognized:

> It would be bizarre to conclude that the framers of Rule 23 would have set forth a careful set of prerequisites for class certification only to deny trial courts the ability to apply those prerequisites in a factually-based and reasoned manner.

Geoffrey P. Miller, Review of the Merits in Class Action Certification, 33 Hofstra L. Rev. 51, 63 (2004).

This Court has acknowledged the significant impact of a class certification on the parties. "A district court's ruling on the certification issue is often the most significant decision rendered in" class proceedings. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

As to defendants, "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Similarly, the aggregation of claims makes it much more likely that a defendant will be found liable, resulting in a higher damage award. Manual for Complex Litig., Fourth § 33.26 n.1069 (2004). Class certification creates "insurmountable pressure on defendants to settle, whereas individual trials would not." *Castano,* 84 F.3d at 746. This pressure squeezes the defendant, regardless of the merits. *See* Theodore Eisenberg & Geoffrey P. Miller, Attorneys' Fees and

Expenses in Class Action Settlements: 1993-2008, 7 J. Empirical Legal Stud. 248, 260 tbl. 4 (2010) (noting that the average settlement in certified federal class actions was well over $100 million).

This impact of class certification stretches across all types of litigation, regardless of subject matter. For example, "[t]he risks associated with antitrust class actions dictate that most cases will be on the fast track to certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, Protecting Competition by Narrowing *Noerr*: A Reply, 18 Antitrust 77, 78 (2003); *see also* Eisenberg & Miller, *supra*, at 262 tbl. 5 (average settlement for antitrust certified class action over $160 million). Indeed, the settlement values of certified class action lawsuits can run into the hundreds of millions, regardless of subject area: mass torts average approximately $255 million; consumer actions average $128 million; and tax cases average $188 million. *Id.* And employment lawsuits, like the *Dukes* action, average over $12 million at settlement following certification. *Id.*

As the Eleventh Circuit has recognized, "blackmail" may be the only value of class certification:

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is,

> except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added).

And Judge Easterbrook, writing for the Seventh Circuit in *Szabo*, articulated the issue as follows: "[c]lass certification turns a $200,000 dispute (the amount that *Szabo* claims as damages) into a $200 million dispute. Such a claim puts a bet-your-company decision to . . . managers and may induce a substantial settlement even if the customer's position is weak." 249 F.3d at 675.

Class certification also has an important impact on absent class members. Class actions are "exception[s] to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Absent putative class members who do not exclude themselves from a class will be bound by any judgment and will not be able to proceed individually. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); Restatement (Second) of Judgments § 41(1)(e). Allowing inadmissible evidence to be considered at the class certification stage may color their view of the likelihood of the action's potential for success and encourage them to stay in the class. As a recent

article explained, regarding the impact of class certification decisions on individuals:

> Class actions . . . are different. The named plaintiff seeks to represent hundreds (or, in the case of Dukes, hundreds of thousands) of people who will never see the inside of the courtroom and will never talk to a lawyer about legal strategy. If she wins, so do they. But if she loses, so do they, and because they could have litigated those claims in the class action, they will be precluded from bringing a new case based on the same subject matter.

Andrew J. Trask, *Wal-Mart v. Dukes*: Class Actions and Legal Strategy, 2010-2011 Cato Supreme Ct. Rev. 319, 353 (2011).

In this way, loose and fuzzy standards for class certification threaten to sweep in and then decide the claims of disparate class members, including those who are absent, to their great potential detriment. While class actions subject to rigorous scrutiny at the certification stage may justify this departure from the norms of due process, that exception must be confined to circumstances where classes can be defined with precision and commonality is truly predominant. There is a great inequity in binding class members, and potentially compromising their legal rights, on the basis of a showing less rigorous than that by which they might prevail as individual plaintiffs.

* * *

The Third Circuit's approach signals a return to the "certify now, worry later" approach that plagued the courts when they were saddled with a fundamental misperception of what this Court's *Eisen* decision meant. It is now clear that *Eisen* does not prohibit a court from examining the merits of an action at the class certification stage if necessary to the class certification decision. Yet a vestige of *Eisen* remains, as courts now struggle with the question of whether the evidence presented at the class certification stage, particularly expert evidence, must be admissible. There is no justification for lowering the standard for admissibility at the class certification stage. To the contrary, there is every reason to ensure that courts uniformly apply *Daubert* at the class certification stage to protect both defendants and absent class members from the ramifications of a wrongly decided class certification decision.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to uphold and enforce the basic commonality requirement of Rule 23 and prevent its circumvention through certification decisions premised on unreliable, inadmissible evidence. The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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v.

CAROLINE BEHREND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

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In the Supreme Court of the United States

No. 11-864

COMCAST CORPORATION, ET AL., PETITIONERS

v.

CAROLINE BEHREND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of

* Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

every size, in every industry, from every region of the country.

Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with over $6 trillion in annual revenues and more than 14 million employees. BRT member companies constitute nearly a third of the total value of the U.S. stock market, pay $163 billion in dividends to shareholders, and generate an estimated $420 billion in sales for small- and medium-sized businesses annually.

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. With offices in New York and Washington, SIFMA is the U.S. regional member of the Global Financial Markets Association.

Amici represent American businesses and business leaders. They routinely file briefs as amici curiae, both in this Court and in other courts, in cases raising issues of vital concern to the business community. This case presents a question of enormous practical importance to amici and their members: *viz.*, whether a trial court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the class is susceptible to awarding damages on a classwide basis. In the decision below, the Third Circuit held that resolution of admissibility is unnecessary at the class-certification stage. That holding directly implicates the interests of amici and their members, which are often the targets of abusive class actions in which the requirements of class certification cannot validly be met.

Amici and their members have extensive experience litigating issues relating to class actions and have frequently participated as amici curiae in cases presenting those issues. For example, the Chamber and SIFMA filed briefs in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), this Court's most recent decision on the requirements for class certification under Federal Rule of Civil Procedure 23. Accordingly, amici have a substantial interest in the question presented here.

SUMMARY OF ARGUMENT

As petitioners' brief explains, the court of appeals erred by holding that the requirements for the admissibility of expert testimony in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), do not apply with full force to expert testimony offered in connection with class certification. In making factual determinations that go to the question of whether the requirements for class certification have been satisfied, a trial court may consider evidence only if it meets the ordinarily applicable standards for admissibility. It necessarily follows that a trial court may consider expert testimony at the class-certification stage only if it meets the standards for admissibility set out in *Daubert*. And where the parties present conflicting evidence on a factual issue relevant to certification, the trial court not only must determine the admissibility of any expert testimony; it also must resolve any factual disputes. The court of appeals' contrary rule cannot be reconciled with this Court's recent decision in *Wal-Mart*, which requires a plaintiff to demonstrate that the applicable requirements of Rule 23 have been satisfied—and specifically, with regard to commonality, that it will be possible to use classwide proof to prove the class members' claims at trial.

As a practical matter, the court of appeals' approach—under which a plaintiff need only show that his expert's testimony "could evolve" to become admissible evidence—dramatically lowers the bar for class certification. That rule seems to have been motivated by a desire to defer difficult decisions on the admissibility of expert testimony until a later point in the litigation. This Court has made clear, however, that trial courts are obligated to ensure actual conformance with the requirements of Rule 23, even where the Rule 23 analysis is difficult. The practical effect of the court of appeals' approach is to outsource a vital judicial function to experts who have been retained, and are usually being compensated, by the parties.

If adopted by this Court, the court of appeals' approach will raise the cost of doing business in the wide variety of industries that find themselves perennial targets of the plaintiffs' bar. Because of litigation costs and damages exposure, a defendant will only rarely choose to litigate a class action past the threshold stage, even if the underlying claims are meritless. Accordingly, billions of dollars are spent settling class actions every year. The costs of abusive class actions impose a drag on the American economy and are ultimately passed on to consumers, employees, and shareholders. The court of appeals' approach will make it easier for plaintiffs with meritless claims to pass through the class-certification gateway. This Court should reject the court of appeals' approach and hold that the rules governing the admissibility of evidence, including expert testimony, apply with full force at the class-certification stage.

ARGUMENT

To obtain class certification under Federal Rule of Civil Procedure 23, a plaintiff must satisfy each of the four requirements of Rule 23(a) and also satisfy the additional requirements of one of the subsections of Rule 23(b). This Court has repeatedly underscored that, in considering those requirements, a trial court is obligated to ensure "actual, not presumed, conformance with Rule 23[]." *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 160 (1982). The court should therefore undertake a "rigorous analysis" of whether each of the relevant requirements has been met. *Id.* at 161.

In analyzing some of the requirements for class certification (such as whether an issue is susceptible to class-wide proof and therefore "common" for purposes of Rule 23(a) and Rule 23(b)(3)), a trial court will inevitably have to make case-specific and fact-intensive determinations—determinations that, in many cases, will require the consideration of expert testimony. And when considering expert testimony at the class-certification stage, no less than at trial, the court is obligated to "exclud[e] expertise that is *fausse* and science that is junky." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 159 (1999) (Scalia, J., concurring).

Where a trial court certifies a class based on expert testimony that may not withstand full scrutiny under the standards for admissibility set out in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), it effectively abdicates its gatekeeping responsibility and allows certification based on something less than full compliance with the requirements of Rule 23. Although decisions about the admissibility of expert testimony under *Daubert* may be difficult in particular cases, there is no valid justification for punting on those decisions at the class-certification stage and deferring them until trial. If

allowed to stand, the court of appeals' holding that *Daubert*'s requirements do not apply with full force at the class-certification stage would substantially lower the threshold for class certification and thereby increase the potential for coercive settlements in meritless class actions. Amici therefore urge this Court to reverse the judgment below.

A. The Court Of Appeals Erred By Holding That *Daubert*'s Requirements For The Admissibility Of Expert Testimony Do Not Apply With Full Force At The Class-Certification Stage

1. The Federal Rules Of Evidence Apply Equally In Class-Certification Proceedings

In making factual determinations that go to the question of whether the requirements for class certification have been satisfied, a trial court may consider only evidence that meets the ordinarily applicable standards for admissibility. The very first provision of the Federal Rules of Evidence, Rule 101(a), specifies that the rules "apply to proceedings in United States courts"—not simply to trials. Although Rule 1101(d) contains certain enumerated exceptions to that general principle, it contains no exception for class-certification proceedings, or for the many other types of civil pretrial proceedings (such as preliminary-injunction hearings) at which parties routinely present evidence. As a logical matter, therefore, the conclusion that the Federal Rules of Evidence apply with full force in class-certification proceedings is seemingly inescapable.

It necessarily follows from that conclusion that a trial court may consider expert testimony at the class-certification stage only if it meets the standards for admissibility set out in *Daubert*. Those standards grew out of the text of Rule 702, which directs a court to deter-

mine whether the expert's knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue" (and whether the expert's testimony is sufficiently reliable). And because Rule 702 is triggered whenever a "trier of fact" is confronted with an expert opinion, *Daubert* applies regardless of whether the "trier of fact" is a judge or a jury. See *Metavante Corp.* v. *Emigrant Savings Bank*, 619 F.3d 748, 760 (7th Cir. 2010), cert. denied, 131 S. Ct. 1784 (2011); *Attorney General* v. *Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009); *Seaboard Lumber Co.* v. *United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002).

The proper application of *Daubert* at the class-certification stage is particularly important in light of this Court's directive that trial courts should undertake a "rigorous analysis" of whether the requirements for class certification have been met. *General Telephone*, 457 U.S. at 161. Where, as here, expert testimony goes to the heart of one or more of those requirements, it is hard to see how a court could conduct that "rigorous analysis" without determining whether the proffered testimony meets the minimum standards for helpfulness and reliability under *Daubert*. After all, the key teaching of *Daubert* is that evidence that is not scientifically valid is unhelpful—*i.e.*, it does not "assist the trier of fact to understand the evidence or to determine a fact in issue," as Rule 702 requires. See *Daubert*, 509 U.S. at 591 (internal quotation marks and citation omitted); *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 640 n.16 (9th Cir. 2010) (Ikuta, J., dissenting), rev'd, 131 S. Ct. 2541 (2011).

At the class-certification stage, moreover, it is not sufficient for a trial court simply to determine the admissibility of evidence (including expert testimony) and then stop there. As this Court made clear in its recent decision in *Wal-Mart*, "[a] party seeking class certification

must affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." 131 S. Ct. at 2551. Thus, where, as here, the parties present conflicting evidence on whether an issue is susceptible to classwide proof (and therefore "common" for purposes of Rule 23(a) and Rule 23(b)(3)), the trial court not only must determine the admissibility of that evidence at the class-certification stage; it also must resolve any factual disputes. See, *e.g.*, *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *West* v. *Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

2. The Court Of Appeals Applied A Watered-Down Version Of The* Daubert *Standard For The Admissibility Of Expert Testimony

In the decision below, the court of appeals took no heed of the foregoing principles. Instead, the court framed the relevant inquiry as whether the model presented by a plaintiff's expert "could evolve to become admissible evidence" and "could be refined between the time when class certification was granted and trial so as to comply with *Daubert*." Pet. App. 44a n.13. Thus, according to the court of appeals, class certification can be based on the testimony of a plaintiff's expert as long as the theory advanced by the expert is "plausible." See *ibid.*

Plausibility is a familiar standard from the pleadings stage of litigation, where a plaintiff need only show that his allegations are plausible in order to survive a motion to dismiss. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-679 (2009); *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). Rule 23, however, "does not set forth a mere pleading standard," *Wal-Mart*, 131 S. Ct. at 2551; a court

may need to "probe behind the pleadings before coming to rest on the certification question," *General Telephone*, 457 U.S. at 160. The text of Rule 23 amply bears that out: in order to grant certification under Rule 23(b)(3), a trial court must "find[]" that common questions predominate over individual ones. The party seeking certification therefore bears the burden of demonstrating that the applicable requirements of Rule 23 have been satisfied—including the burden of proving any disputed factual issue. See, *e.g.*, *Wal-Mart*, 131 S. Ct. at 2548.

More specifically, the legal rule adopted by the court of appeals cannot be reconciled with one of this Court's central holdings in *Wal-Mart*: namely, that, in order to demonstrate actual compliance with the commonality requirement of Rule 23(a), the plaintiff must satisfy the court that it will be possible to use classwide proof to prove the class members' claims at trial. In *Wal-Mart*, the Court explained that "[w]hat matters to class certification * * * is not the raising of common 'questions'—even in droves—but[] rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." 131 S. Ct. at 2551 (ellipses in original; citation omitted). For that reason, the Court concluded that, in order to satisfy the commonality requirement, the plaintiff must demonstrate that it will be possible at trial to "resolve an issue that is central to the validity of each one of the [class members'] claims *in one stroke*." *Ibid.* (emphasis added).

If a plaintiff seeks to satisfy the commonality requirement at the class-certification stage with evidence that may or may not be admissible, he has not demonstrated that it will be possible to resolve the class members' claims at trial "in one stroke," and certification must therefore be denied. As Judge Jordan put it in his opinion dissenting in relevant part, "[a] court should be

hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything." Pet. App. 66a n.18. Were the rule otherwise, it would greatly increase the risk that a trial would degenerate into an unwieldy spectacle of the type Rule 23 is designed to guard against—a risk posed in this very case as a result of the court of appeals' decision.

Given the Court's holding in *Wal-Mart* that a plaintiff must satisfy the trial court that it will be possible to use classwide proof to prove the class members' claims at trial, it is unsurprising that the Court expressed "doubt" about the proposition that *Daubert* does not apply at the class-certification stage. 131 S. Ct. at 2554. Remarkably, the court of appeals acknowledged that statement, but then cited it in support of its contrary conclusion that the relevant inquiry is whether the model presented by a plaintiff's expert "could evolve to become admissible evidence." Pet. App. 44a n.13. There is simply no support, either in this Court's decisions or in the Federal Rules of Evidence, for that standard. The Court should take this opportunity to make clear what it all but held in *Wal-Mart*: that the *Daubert* standard for the admissibility of expert testimony applies with full force at the class-certification stage.

3. *Plaintiffs' Expert Testimony Does Not Satisfy The* Daubert *Standard*

If the court of appeals had applied the *Daubert* standard here, it surely would have concluded that the expert testimony offered by plaintiffs in this case was deficient—and therefore that, because the issue of damages was not susceptible to classwide proof, plaintiffs could not satisfy the predominance requirement of Rule 23(b)(3).

In seeking to meet their burden of showing that the issue of damages was susceptible to classwide proof, plaintiffs relied on the opinion of a single expert, who attempted to demonstrate anticompetitive effects from alleged misconduct in the relevant market area. To do so, the expert developed a model based on a number of theories of anticompetitive impact by comparing cable prices in that market area to those in other counties. But that model, by the expert's own admission, could not be used to isolate damages attributable to some forms of conduct rather than others. Accordingly, after the district court rejected every theory of impact but one, the expert did not alter his opinions or model. At that point, the expert's model was useless, because it had built into its comparative prices the effects of conduct that, according to the district court, did not constitute anticompetitive impact. The expert's testimony was therefore neither relevant nor reliable—indeed, it was not even "plausible"—because it was based on a patently flawed methodology. See Pet. App. 68a-70a (Jordan, J., dissenting in relevant part).

If the testimony of the damages expert had been excluded, plaintiffs would not have been entitled to class certification. And because it is far from clear that the expert's testimony will be admissible at trial, there is every reason to believe that, if the court of appeals' decision is allowed to stand, the resulting trial will be little more than an aggregation of individualized proofs. That sort of unmanageable proceeding is surely not what the framers of Rule 23 contemplated—nor what this Court contemplated when it interpreted Rule 23's requirements in *Wal-Mart*.

B. The Court Of Appeals' Approach Dramatically Lowers The Bar For Class Certification

The problems with the testimony of plaintiffs' expert in this case reflect the fundamental problem with the court of appeals' legal rule: as a practical matter, it dramatically lowers the threshold for class certification. At the outset, it is important to remember that the *Daubert* factors—whether an expert's theory has been tested, has been subjected to peer review, has a known or potential rate of error, and enjoys general acceptance, see 509 U.S. at 593-594—do not require absolute perfection. A trial court applying *Daubert* must simply ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. In fact, according to the Third Circuit, an expert's opinion may be admissible under *Daubert* "even if the judge thinks that [an expert's] methodology has some flaws such that if they had been corrected, the [expert] would have reached a different result." *In re Paoli Railroad Yard PCB Litig.*, 35 F.3d 717, 744 (1994), cert. denied, 513 U.S. 1190 (1995). The Third Circuit's evident uncertainty in this case about whether the testimony of plaintiffs' expert would ultimately be admissible under *Daubert* amply demonstrates just how low the court set the bar for class certification.

The court of appeals' rule—under which the relevant inquiry at the class-certification stage is whether the model presented by a plaintiff's expert "*could* evolve to become admissible evidence," Pet. App. 44a n.13 (emphasis added)—seems to have been motivated by a desire to defer difficult decisions on the admissibility of expert testimony until a later point in the litigation. Such an approach is not within the district court's discretion at the class-certification stage. It is the court's affirmative

obligation to ensure "actual, not presumed, conformance with Rule 23[]," even where the Rule 23 analysis is difficult. *General Telephone*, 457 U.S. at 160. To be sure, the *Daubert* inquiry routinely requires courts to make difficult decisions on complex matters that may be outside their comfort zone. But those difficulties do not abate after class certification. There is no valid justification for relaxing the obligation to ensure conformance with Rule 23 simply because the analysis turns in whole or in part on expert testimony.

The court of appeals' rule is problematic for an additional reason. If a trial court can certify a class simply by deferring to the conclusions of a plaintiff's expert without conducting an independent assessment of his methodology—much less resolving any conflicts between that expert's conclusions and those of the defendant's expert—it will effectively put a thumb on the scales in favor of class certification. Such deference bespeaks undue passivity at best and a bias toward class certification at worst: it "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West*, 282 F.3d at 938; see Kermit Roosevelt, III, *Defeating Class Certification in Securities Fraud Actions*, 22 Rev. Litig. 405, 425 (2003) (noting, in discussing *West*, that "[a]n expert who testifies * * * that every plaintiff has suffered injury is in effect testifying that injury may be established by common proof," but that "the decision as to whether the elements of a claim are susceptible to common proof is for the judge and may not be handed off to experts").

This case presents a context in which the court of appeals' rule will have a particularly acute effect. In class actions for monetary damages—particularly antitrust and securities class actions—plaintiffs frequently seek to satisfy the predominance requirement of Rule 23(b)(3)

by asserting that, notwithstanding the fact that damages will ordinarily vary from class member to class member, the issue of damages should be regarded as a "common" one in a given case because it is susceptible to classwide proof through an expert's damages model. Under the court of appeals' approach, however, all a plaintiff will have to do in order to take the damages issue off the table for certification purposes is to come forward with an expert with a purportedly "plausible" damages model in hand. Should this Court adopt the court of appeals' rule, therefore, it promises to make it considerably easier than the framers of Rule 23 intended for plaintiffs to obtain class certification in this context—and a host of others.

C. If Adopted By This Court, The Court Of Appeals' Approach Would Increase Pressure On Defendants To Settle Class Actions And Impose A Burden On The Nation's Economy

It is hard to overstate the significance of the standards that trial courts apply in making class-certification decisions. That is because the class-certification decision will often be the most important decision a trial court makes in a class action; indeed, one commentator has aptly described it as "the whole shooting match." David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Prod. Liab. L. & Strategy 10 (Feb. 2009).

If this Court were to loosen the standards for class certification in the manner contemplated by the court of appeals, it would have pernicious consequences due to the peculiar dynamics of class-action litigation—dynamics that this Court has frequently recognized. In particular, once plaintiffs obtain class certification, the costs and risks of litigation compel defendants to settle even meritless claims. As explained below, such settle-

ments result in costs not only to defendants, but to the entire economy.

1. Class Actions Impose Substantial Costs On Defendants

To begin with, defendants that choose to litigate a class action face enormous and asymmetric discovery costs. Discovery in a class action typically results in an uneven playing field, because discovery will ordinarily be focused on the defendants (who have much more discoverable material in their possession). And the costs of discovery have only risen in recent years, with the ubiquity of electronic communication and the advent of "e-discovery." As one lower court recently put it, "[w]ith the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical." *Swanson* v. *Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010). And the costs of discovery are not simply monetary; they "can include * * * the disruption of the defendant's operations," as a defendant's management and employees are required to devote time to responding to document requests and preparing and sitting for depositions. *Ibid.*; see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975).

The costs of discovery, moreover, are but one of the costs of litigating class-action claims through to final judgment. Preparing for trial in class action cases can be particularly challenging where, as here, the defendant has no certainty as to what a trial in the case would look like. In this case, it is concededly uncertain whether the plaintiff will be able to present admissible evidence at trial from which damages can be awarded on a classwide basis. If the plaintiff is unable to do so, there is every

chance that the case will devolve into a series of individualized mini-trials on damages. In those circumstances, it is hard to square the decision to grant certification with the "critical need * * * to determine how the case will be tried" at the class-certification stage. Fed. R. Civ. P. 23 advisory committee's note (2003).

When it comes to certain types of class actions, including antitrust class actions, the costs of litigation are particularly pronounced. Antitrust class actions are "arguably the most complex action[s]" to litigate. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (citation omitted). That is because they typically involve "voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money." *Manual for Complex Litigation* § 30, at 519 (4th ed. 2004). And if antitrust class actions are the most difficult to litigate, securities class actions are not far behind—as this Court has repeatedly recognized. See, *e.g.*, *Blue Chip Stamps*, 421 U.S. at 739 (noting that securities-fraud litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general").

Accordingly, the costs associated with defending class-action claims are staggering. Class-action cases are not only complex; they often drag on for years. With regard to securities class actions, for example, the median length of time between the filing of the complaint and the settlement hearing is 3½ years. See Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2011 Review & Analysis* 5 (2012) (Ryan & Simmons). In such circumstances, the legal fees, expert fees, and miscellaneous costs associated with defending even a relatively modest class-

action claim can easily run into the millions of dollars. And in complex antitrust or securities cases, those fees and costs can be orders of magnitude higher.

Finally, should a defendant choose to litigate class-action claims through to final judgment, the risks at trial will be great. Empirical research suggests that, as the number of plaintiffs in a case increases, juries are "much more likely" to find fault and to return "significantly higher" damages awards than the merits of the case would warrant. Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 491-492 (1996). And once again, when it comes to certain types of class actions, those risks are particularly pronounced. In antitrust class actions, defendants are subject to treble damages. And in securities class actions, the most miniscule effects on a company's share price from an alleged misrepresentation can result in massive damages even without the threat of trebling.

2. *The Costs And Risks Of Litigating Class Actions Force Defendants To Settle Even Meritless Claims*

This Court has long recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). The very fact of certification gives a class-action plaintiff enormous leverage in settlement negotiations; lower courts have variously described the pressure on defendants to settle in the wake of certification decisions as "inordinate," "hydraulic," and "intense." See *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); *In re Rhone-*

Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir.), cert. denied, 516 U.S. 867 (1995).

Even if they face only a marginal chance of defeat at trial, therefore, most rational defendants will succumb to what Judge Friendly aptly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). That intuition has amply been borne out in practice: a recent study found that, once certification has been granted, approximately 90% of class actions settle. See Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). It is almost unheard of for an antitrust or securities class action involving a major company to go to trial; between 1996 and 2011, aggregate settlements of securities class actions have averaged just under $4.5 billion per year. See Ryan & Simmons 2.

Those settlements have little to do with the merits of the claims at issue. In the securities context, for example, the best indicators of the settlement value of a case are (1) the size of the decline in stock price and (2) the amount of insurance coverage available to cover defendants' potential exposure. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 516-518 (1991). Largely for that reason, class actions have a "weak" deterrent effect at best, because "the merits of claims" are "frequently irrelevant to their initiation or [their] settlement values." Ralph K. Winter, Jr., *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 952 (1993).

The pressure to settle even meritless class actions results in windfalls to the plaintiffs. In perhaps the most famous example, the plaintiffs in the Agent Orange liti-

gation received a $180 million settlement, even though the trial court "viewed [their] case as so weak as to be virtually baseless." *In re 'Agent Orange' Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 151 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). And the practical reality is that those windfalls redound to the primary benefit not of the plaintiffs, but of their lawyers. The average class action settles for pennies on the dollar, with lawyers taking a substantial percentage off the top; in 2011, the average settlement in a securities class action was for 2.1% of the claimed losses. See Ryan & Simmons 7. And no one is under any illusions about the proposition that class-action litigation is driven by the plaintiffs' class-action bar. As the Senate Judiciary Committee observed while considering the Class Action Fairness Act of 2005, "the lawyers who bring the lawsuits effectively control the litigation," and "the clients are marginally relevant at best." S. Rep. No. 109-14, at 4 (2005).

3. The Costs Of Abusive Class Actions Burden The American Economy And Undermine American Capital Markets

The costs of abusive class actions do not simply fall on individual defendants; they impose a drag on the entire economy. As one lower court recently noted, "[n]o one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (Boudin, J., concurring). In this regard, any rule that permits meritless class actions to proceed to trial is functionally equivalent to a rule that lowers the applicable standards of substantive liability, because it incentivizes lawyers to bring claims they otherwise might forgo. See Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995). As a result, "too many resources * * * [are] spent on litigation and on litigation avoidance," with those costs affecting

capital formation "just as if a wasteful tax had been imposed." *Ibid.*

Inevitably, the costs resulting from abusive class actions "get passed along to the public." *Tambone*, 597 F.3d at 453 (Boudin, J., concurring). When confronted with the cost of a class action that improperly gets past the certification stage, a company may pass some of that cost on to consumers in the form of higher prices. Or it may be forced to take some other action to offset that cost, such as scaling back its operations. In either instance, the ultimate burden will be borne by innocent parties with no connection to the alleged wrongdoing.

In addition, the costs of abusive class actions move markets. The average securities class action alone reduces a defendant company's equity value by 3.5%. See Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 14 (U.S. Chamber Institute for Legal Reform 2005). Smaller companies often suffer an even greater loss in equity value, in part because they are less able to achieve economies of scale in litigation costs. See *id.* at 9-10.

As this Court has noted, therefore, the costs associated with class actions are "payable in the last analysis by innocent investors for the benefit of speculators and their lawyers." *Blue Chip Stamps*, 421 U.S. at 739 (quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring)). In securities class actions, in particular, the result is often simply to transfer wealth from current shareholders to former ones, with the plaintiffs' bar collecting a sizable tax on the transfer. See, *e.g.*, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503 (1996). In those circumstances, allowing class actions to proceed is "like seeking to deter burglary by imposing penalties on the victim for having suffered a

burglary." John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1537 (2006).

The costs of abusive class actions are not only harming individual businesses; they are threatening the longstanding preeminence of American capital markets. To begin with, abusive class actions hinder the very functioning of those markets. Perversely, "[a]busive litigation severely affects the willingness of corporate managers to disclose information to the marketplace," because managers are afraid that any statement has the potential to become the basis of a civil lawsuit. H.R. Conf. Rep. No. 104-369, at 42 (1995). That fear creates an incentive for management "to volunteer nothing" about the company's prospects. Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* 339 (1991). But that is precisely the wrong incentive for management, because markets function best when there is robust information available about participating companies.

In addition, as this Court has recognized, abusive class actions are "shift[ing] securities offerings away from domestic capital markets." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). With the ever-greater liquidity of capital, it is imperative that American markets remain attractive to outside investment. Yet it is widely perceived that the United States legal system imposes greater costs on businesses than the legal systems of other major capital markets (such as the United Kingdom). See, *e.g.*, Michael R. Bloomberg & Charles E. Schumer, Introduction, *Sustaining New York's and the US' Global Financial Services Leadership* ii (2007) <tinyurl.com/ny-report>. As a result, "foreign companies [are] staying away from US capital markets for fear that the potential

costs of litigation will more than outweigh any incremental benefits of cheaper capital." *Id.* at 101. The perception of higher litigation costs has frequently been cited as one of the reasons for the recent decline in the competitiveness of American capital markets. See, *e.g.*, Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* 5 (2006).

* * * * *

As a legal matter, the specific question presented by this case may seem an obscure one. As a practical matter, however, there can be no dispute that the court of appeals' approach will make it easier for plaintiffs with meritless claims to pass through the class-certification gateway, imposing deleterious costs on the Nation's economy. There is no valid justification for relaxing the standard of admissibility in the class-certification context. Amici respectfully urge this Court to reject the court of appeals' approach and reaffirm the foundational principle that the requirements for class certification should be rigorously applied.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2012

AMICUS CURIAE BRIEF

No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, COMCAST HOLDINGS CORPORATION, COMCAST CABLE COMMUNICATIONS, INC., COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., AND COMCAST CABLE HOLDINGS, LLC,

Petitioners,

v.

CAROLINE BEHREND, STANFORD GLABERSON, JOAN EVANCHUK-KIND AND ERIC BRISLAWN,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

This is just such a case. DRI members regularly defend against proposed class actions in a variety of contexts and are confronted day-in and day-out with certification motions based on nothing more than junk science presented by so-called "experts." Unfortunately, as happened here, such motions are sometimes granted, even though the purported expert could not survive a challenge under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). What is worse, erroneous certification is almost always a complete litigation game changer.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both petitioners and respondents have consented to this filing in letters on file with the Clerk's office.

Because of the enormous hydraulic pressure to settle class actions, meritless cases become found money for the plaintiffs' bar as soon as certification is granted. Accordingly, and for the reasons discussed below, this Court should reverse and confirm that admissible evidence is required to justify the pivotal certification decision.

INTRODUCTION

The district court certified a class that is larger and more diverse than the one this Court rejected in *Wal-Mart*. See Pet. App. 82a-83a, 163a. With over two million individuals served by 650 different franchises over the course of 13 years, the class was flawed from the start. *Id.* Yet plaintiffs were permitted to gloss over these differences by proffering a purported expert whose model suffered from fundamental and fatal methodological flaws. *Id.* at 40a; see also J.A. 189a-190a; Pet. Br. 16-35; Pet. App. 66a (plaintiffs' damages model is "incapable of identifying any damages caused by reduced overbuilding") (Jordan, J., dissenting). According to the Third Circuit, the absence of admissible evidence posed no barrier to certification because Rule 702 and *Daubert* simply do not apply. Instead, "[a]t the class certification stage," the Third Circuit only required "assur[ances]" that damages "are capable of measurement" at some later stage, Pet. App. 46a, and it sufficed that the model "could be refined . . . so as to comply with *Daubert*" in the future, *id.* at 44a n.13.

This was profound error. First, the decision below is irreconcilable with this Court's precedents. As the Court has explained, plaintiffs must "affirmatively demonstrate" that they satisfy the requirements of Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011). Whether plaintiffs try to carry

that burden by offering expert opinions or through other means, district courts must "rigorous[ly] analy[ze]" plaintiffs' showing and make "find[ings]" as to whether plaintiffs can, "in fact," try their claims together with common evidence. *Id.*; Fed. R. Civ. P. 23(b)(3). This necessarily entails determining whether plaintiffs' expert evidence (if any) comports with Rule 702 and *Daubert*.

Second, allowing plaintiffs to obtain class certification with inadmissible expert opinions contravenes fundamental fairness. By piling numerous claims into one action, class certification "dramatically affects the stakes for defendants" and exerts "insurmountable pressure" to settle. *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). When a class is certified, the game is decided for all intents and purposes. As a result, a ruling that admissible evidence is not required would essentially allow courts to impose astronomical liability on a defendant without the basic building blocks of a civil case. This Court has recognized the importance of allowing only genuinely meritorious cases to proceed beyond the earliest stages of litigation because of the massive costs both to defendants and the judicial process. That approach requires reversal here.

Finally, affirming that inadmissible expert opinions cannot support class certification is essential to confine class actions to appropriate cases. Expert opinions are omnipresent in class certification proceedings in all types of cases, on all elements of plaintiffs' claims. The Third Circuit's indulgent approach towards these opinions would throw open the gate to class certification. The Court should reject that approach and require district courts to fulfill their vital gatekeeper duty to demand admissible evidence before certifying a class action.

ARGUMENT

I. THIS COURT'S PRECEDENTS REQUIRE PLAINTIFFS TO PRESENT ADMISSIBLE EVIDENCE BEFORE OBTAINING CLASS CERTIFICATION.

This Court's decisions make clear that plaintiffs cannot obtain class certification without introducing admissible evidence. As the Court recently held, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 131 S. Ct. at 2551. Rather, "[a] party seeking class certification must *affirmatively demonstrate* his compliance with the Rule—that is, he must be prepared to *prove* that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (first and second emphases added); see also *id.* at 2552 n.6 ("plaintiffs seeking 23(b)(3) certification must prove" the Rule 23 requirements even if "they will surely have to prove [certain issues] *again* at trial").

Accordingly, district courts must conduct a "'rigorous analysis'" of Rule 23's criteria before "find[ing]" that the case qualifies for class treatment. *Id.* at 2551 (quoting *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982)); Fed. R. Civ. P. 23(b)(3). This entails giving the case a "close look," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997), in which the court "probe[s] behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160. These precedents reflect this Court's proper misgivings about allowing cases to proceed beyond the earliest stages of litigation without meaningful judicial scrutiny because it will cause even unmeritorious claims to recover some settlement value from defendants who cannot risk the chance of a huge damages award.

If the term "rigorous analysis" is to mean anything, it must require findings "based on adequate admissible evidence." *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); see also *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (court must "receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met"). Indeed, an analysis conducted without valid evidence is the antithesis of "rigorous"—it is indefensible *ipse dixit*. As Judge Jordan explained in dissent, "[a] court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything." See Pet. App. 66a n.18.

Thus, if plaintiffs try to carry their burden by offering an expert opinion, the district court must decide whether the opinion satisfies Rule 702 and *Daubert*'s standards for helpful and reliable expert evidence. There is no reason why evidence falling short of these standards should ever be allowed to support class certification. *Wal-Mart*, 131 S. Ct. at 2553-54; see, *e.g.*, *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (per curiam). If plaintiffs cannot introduce admissible common evidence in support of class certification, the court has no basis to "find" that plaintiffs can try their case on a class-wide basis. *E.g.*, *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011); *IPO Sec. Litig.*, 471 F.3d at 41; *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

As petitioners detail, plaintiffs' proffered expert testimony did not remotely satisfy Rule 702 and *Daubert*'s threshold requirements of helpfulness and reliability. Pet. Br. 44-49. Nor *could* admissible expert testimony ultimately be proffered: The pro-

posed class of over two million individuals scattered across 650 different pricing franchises presents individualized damages issues that cannot be resolved in a single proceeding. But, instead of requiring the district court to confront the flaws in the expert's model, the Third Circuit held that the district court's task was only "to evaluate whether an expert is presenting a model which could evolve to become admissible evidence." Pet. App. 44a n.13. Under this amorphous standard, it sufficed that "the District Court likely determined that [plaintiffs' expert's] model could be refined between the time when class certification was granted and trial so as to comply with *Daubert*." *Id.* That is no meaningful gate to keep, and certainly is not the "rigorous analysis" that Rule 23 requires.

II. FUNDAMENTAL PRINCIPLES OF FAIRNESS REQUIRE PLAINTIFFS TO INTRODUCE ADMISSIBLE EVIDENCE.

Certifying a class without admissible evidence also contravenes basic principles of fairness by effectively imposing exponential liability on a defendant without the basic building blocks of a civil case. *E.g.*, *Superintendent* v. *Hill*, 472 U.S. 445, 455 (1985) (due process is violated "if the decision is not supported by any evidence"); *Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979) (decision based upon "a record wholly devoid of any relevant evidence . . . is constitutionally infirm").

It is well-established that "[a] district court's ruling on the certification issue is often the most significant decision rendered in . . . class-action proceedings." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). Class certification "dramatically affects the stakes for defendants" because the aggregation of claims into a single action "creates insurmountable pressure on defendants to settle, whereas individual

trials would not." *Castano*, 84 F.3d at 746; see also, *e.g.*, Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006) ("[T]he *overwhelming majority* of actions certified to proceed on a class-wide basis . . . result in settlements.") (emphasis added); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1276 (2002) (explaining class certification's "serious impact on settlement dynamics").

Empirical studies have consistently confirmed what courts and commentators know to be true. For example, a 2005 Federal Judicial Center study found that approximately 90% of the suits under review that were filed as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). And a subsequent Federal Judicial Center study found that *every* certified class action in its (smaller) sample terminated in a settlement. Emery G. Lee III & Thomas G. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 11-15 (2008).[2]

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[2] Available at http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/$file/cafa1108.pdf.

Studies of class actions in state courts find similarly high settlement rates. See, *e.g.*, Hilary Hehman, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation* 23 (2010) ("Eighty-nine percent of certified cases ended in settlement, as compared to only 15% in cases with no certification.")[3]; Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts* 840 (2010) ("Out of the eighty cases that were class certified, a total of fifty-nine (74%) resulted in a settlement, with twelve still pending.").

This intuitively obvious settlement pressure exists even when plaintiffs' claims lack merit. Indeed, in enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, Congress observed that "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage," which "can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous law-suits." S. Rep. No. 109-14, at 20 (2005); see also *id.* at 21 ("[T]he ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions."). This Court too has recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740

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[3] Available at http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf.

(1975) ("even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial").

Judge Posner illustrated why this is so. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). In that case, plaintiffs' claims were far from strong: Indeed, the defendant had lost only one of the first 13 individual trials. *Id.* The defendant therefore could reasonably predict that, if class certification were denied, it would be forced to pay damages in approximately 25 of the 300 cases. *Id.* Assuming that each prevailing suit would result in $5 million in damages, the defendant could estimate its total potential exposure to be $125 million. *Id.* But, if class certification were granted, the defendant would suddenly face claims, not just by the individual plaintiffs who filed suit, but by all class members—5,000 strong. The defendant would thus have a one-in-thirteen chance of owing $25 billion—"and with it bankruptcy." *Id.*; see also Nagareda, *supra*, 106 Colum. L. Rev. at 1881-82 (providing similar example). As Judge Posner concluded, the defendant "may not wish to roll these dice" and "will be under intense pressure to settle." *Rhone-Poulenc Rorer*, 51 F.3d at 1298.

These realities refute the Third Circuit's unfounded assumption that there will be plenty of time after class certification for expert evidence to "evolve" and "be refined." Pet. App. 44a n.13; see also, *e.g.*, *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 26-29 & n.6 (N.D. Ga. 1997) ("postpon[ing]" analysis of whether the expert's opinion satisfies *Daubert* and requiring plaintiffs to describe only "the *type* of evidence with which they will attempt to prove their case"). Nor may defendants take comfort in the

technical truth that a certification order may be "modified" later. See Fed. R. Civ. P. 23(c)(1); see, *e.g.*, *Barnes* v. *Am. Tobacco Co.*, 176 F.R.D. 479, 492-93 (E.D. Pa. 1997) (granting certification "even though this case may present a close question . . . because the Court may amend the certification order before a decision on the merits"), *aff'd*, 161 F.3d 127 (3d Cir. 1998).[4] Almost always, the certification decision leads rapidly to settlement and the defendant pays off the plaintiffs to avoid intolerable risk.

In effect, certification determines "liability." For this reason as well, the Court should demand admissible evidence at the certification stage. Otherwise, courts are effectively imposing enormous liability on defendants without the slightest showing that a class claim has any legal merit. Fundamental fairness requires more.

III. EXPERT OPINIONS PERVADE CLASS CERTIFICATION PROCEEDINGS.

Finally, if expert opinions are not subject to the basic requirements of admissibility, winning class certification will become as simple as hiring an expert witness. Plaintiffs' strategy in this case is not unique: In all types of cases and on all aspects of their claims, plaintiffs offer expert opinions that seek to smooth over individualized differences among putative class members.

This case is paradigmatic of antitrust suits in which plaintiffs try to compensate for overbroad classes with an expert's promise to make differences

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[4] Indeed, it is not even clear whether or when modification orders are appealable under Federal Rule of Civil Procedure 23(f). *See, e.g.*, *Carpenter* v. *Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006).

among damages claims magically disappear. See, *e.g.*, *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003) (affirming denial of class certification because expert's formula "in no way account[ed] for the vast differences among those class members," and "[a]ny reasonable approximation of the damages actually suffered by the various class members" would require "individualized damages inquiries"); *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (en banc) (affirming denial of class certification because damages did not lend themselves to "mechanical calculation, but required 'separate "mini-trial[s]"' of an overwhelming large number of individual claims").

This case is also an example of how plaintiffs employ experts in an attempt to satisfy the other elements of an antitrust claim. Rule 23 analysis "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). To obtain class certification, plaintiffs must show commonality, typicality, and predominance as to all elements of their claims, and they often hire an expert to opine for them. See 1 Joseph P. McLaughlin, *McLaughlin on Class Actions* § 3:14, at 445 (8th ed. 2011) ("The use of expert testimony, including expert reports and affidavits, is common in support of and in opposition to the class certification motion."); see also Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of* Daubert *and the Defendant's Proof*, 28 Rev. Litig. 71, 72 (2008) (plaintiffs "often" attempt to meet their burden with an expert, and defendants "invariably" respond with an expert of their own).

In antitrust cases like this one, plaintiffs frequently call upon an expert economist to say the defendant's

conduct had a common antitrust impact on all class members. See, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2009); *Blades* v. *Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); Pet. App. 15a-34a. As commentators have observed, "[t]he low bar for acceptance of economic expert evidence applied in many class certification proceedings has created a 'niche' for evidence based on methodologies created solely for the purpose of such proceedings, which therefore have not been subjected to peer review." John H. Johnson & Gregory K. Leonard, *In the Eye of the Beholder: Price Structure as Junk Science in Antitrust Class Certification Proceedings*, 22 Antitrust 108, 108 (2008). Courts should not base the crucial certification decision on such unreliable opinions.

The need to guard against flimsy expert opinions is equally present in securities cases. Plaintiff investors claiming securities fraud must prove, among other things, that they relied on the defendants' misrepresentation, which generally presents a highly individualized inquiry that cannot be decided on a class-wide basis. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988). But a class of investors may proceed together under the fraud-on-the-market-theory if they can show they traded shares in an "'efficient market'" that incorporated the misrepresented information into the share price. *Id.* at 248; *Wal-Mart*, 131 S. Ct. at 2552 n.6; see, *e.g.*, *In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1, 7-8 (1st Cir. 2005). Proving "market efficiency" typically entails complex "statistical, economic, and mathematical analysis." *Unger*, 401 F.3d at 323 n.6. Consequently, market efficiency often triggers a battle at the class certification stage waged through expert witnesses. See, *e.g.*, *id.* ("many courts have considered [expert

testimony] when addressing" market efficiency); *Polymedica*, 432 F.3d at 5 (the district court considered "both parties' expert reports and literally hundreds of pages of exhibits focused on market efficiency"). If plaintiffs' expert opinions need not even satisfy Rule 702 and *Daubert*—let alone overcome a competing expert's opinion—far more meritless strike suits will be filed and certified and payments by defendants will be forthcoming.

The district court's gatekeeper role is also critical in employment discrimination cases. Just as in *Wal-Mart*, plaintiff employees seeking class certification often enlist experts to opine that the employer has a "culture" of gender stereotyping that influenced employment decisions. *E.g.*, *Ellis*, 657 F.3d at 982-83; see *Wal-Mart*, 131 S. Ct. at 2553-54. The Court suggested in *Wal-Mart* that such opinions can easily stray beyond what Rule 702 and *Daubert* admit. See 131 S. Ct. at 2553 n.8; see also John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1748 (2008) (concluding that admissible expert opinion cannot offer "linkage of general research to specific facts"); cf. Allan G. King & Syeeda S. Amin, *Social Framework Analysis as Inadmissible "Character" Evidence*, 32 Law & Psychol. Rev. 1, 3 (2008) (arguing that "social framework evidence" can constitute "mere character evidence that should be excluded under Rule 404(a)"). District courts must therefore closely scrutinize such opinions before subjecting employers to potential financial ruin.

The above examples are just a few of the many contexts in which the class certification decision hinges on disputed expert analysis. Proposed class actions in products liability, toxic torts, and numerous other areas of law also frequently feature

expert opinions. See, *e.g.*, *Am. Honda*, 600 F.3d at 815-16 (reversing class certification order for which the "expert's report or testimony [was] critical" because the district court failed to "perform a full *Daubert* analysis"); *Sher* v. *Raytheon*, 419 F. App'x. 887, 890 (11th Cir. 2011) ("the district court erred . . . by not sufficiently evaluating and weighing conflicting expert testimony"), *rev'g*, 261 F.R.D. 651, 670 (M.D. Fla. 2009). In all of these instances, Rule 23 and basic fairness require that plaintiffs present admissible evidence before obtaining the all-important class certification order.

CONCLUSION

For these reasons, and those stated by petitioners, the decision of the Third Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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In The
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BRIEF OF ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICI CURIAE*[1]

Amici are economists with over fifty years of combined professional experience related to economic analyses used in class action litigation to determine whether damages can be proven on a class-wide basis. Their experience cuts across a broad cross-section of

[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* Dr. John H. Johnson has been retained by Petitioner Comcast Corporation on two occasions in unrelated wage and hour class action litigation.

industries and areas of the law, including antitrust, labor and employment, consumer fraud, and product liability. They have testified on behalf of both plaintiffs and defendants in litigation.

Dr. John H. Johnson is the President and CEO of Edgeworth Economics, an economic consulting firm. He is also an Affiliated Professor at Georgetown University's Public Policy Institute. At Georgetown, Dr. Johnson teaches courses in Antitrust and Public Policy and in the Law and Economics of Discrimination in Public Policy. His academic research focuses on issues at the intersection of law and economics particularly related to class certification and damages calculations. Dr. Johnson's scholarship has been published widely, including in the *Journal of Labor Economics*, the *Antitrust Law Journal*, the *Industrial Labor Relations Review*, and the *Journal of Competition Law and Economics*. Dr. Johnson is an Associate Editor of the *Antitrust Law Journal*. He has testified as an expert in numerous proceedings in federal and state court.

Dr. Gregory K. Leonard is a Senior Vice President of Edgeworth Economics. He was formerly an assistant professor of Economics at Columbia University. He has written widely on the economics of competition and intellectual property. Dr. Leonard's numerous academic articles have been published in the *RAND Journal of Economics*, the *Journal of Econometrics*, the *Journal of Industrial Economics*, the *Journal of Labor Economics*, the *Antitrust Law Journal*, and the *Journal of Competition Law and Economics*, among other publications. He is a Senior Editor of the *Antitrust*

Law Journal. Dr. Leonard served as a consultant to and testified before the federal Antitrust Modernization Commission, and he has provided economic consulting services to the United States Department of Justice and the Ministry of Commerce of the People's Republic of China.

Together, Dr. Johnson and Dr. Leonard have co-authored watershed academic studies regarding the use of economic analysis in making class certification determinations, particularly in the antitrust field.[2]

Dr. Laila Haider is a Senior Vice President of Edgeworth Economics. She specializes in the economics of class certification in both antitrust and labor and employment. Dr. Haider has published her research in the *Journal of European Economic Association* and in *The Antitrust Practitioner*. She has served as an expert witness and has spoken widely on the role of economic analysis in class certification.

As a result of their extensive economic expertise in the area of class certification, *amici* are singularly positioned to offer this Court practical insights into how empirical economic testing, which is admissible under the rules of evidence and principles governing the introduction of expert testimony, can and does work in accordance with fundamental scientific

---

[2] *See* John H. Johnson & Gregory K. Leonard, *Rigorous Analysis of Class Certification Comes of Age*, 77 ANTITRUST L. J. 569 (2011); Fei Deng, *et al.*, *Economic Analysis in Indirect Purchaser Class Actions*, 26 ANTITRUST 51 (2011); John H. Johnson & Gregory K. Leonard, *Economics and the Rigorous Analysis of Class Certification in Antitrust Cases*, 3 J. COMPETITION L. & ECON. 341 (2007).

principles to allow courts to determine at the initial stages of litigation whether alleged class damages can reliably be shown through common proof. This economic testing also provides the exacting analysis that this Court has held must be undertaken before a putative class can be certified.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici take no position on the outcome of this particular litigation. They instead wish to advise the Court that scientifically rigorous economic models, admissible as evidence under *Daubert* standards, are available by which both litigants and courts can reliably determine at the class-certification stage the viability or inviability of computing and awarding damages on a class-wide basis. There thus is no economic or scientific reason why courts could not make a full, impartial, and thorough assessment of the propriety of class certification as to damages at the outset of cases, should this Court hold that Federal Rule of Civil Procedure 23 requires such proof. And those available economic models have the scientific rigor needed to be admissible as evidence. *Amici* take no position on whether, had those scientifically rigorous tools been employed here, they would have supported or foreclosed class certification.

1. The rigorous analysis and probing behind the face of pleadings that this Court has held must be conducted to determine whether a class should be certified under Rule 23 necessarily extends to damages claims in proposed Rule 23(b)(3) class actions. As is true with liability, common damages

issues must predominate over individual issues for a Rule 23(b)(3) class to be certified.

The predominance requirement, in turn, means that the plaintiff must establish that there is a common method for reliably and accurately measuring damages on a class-wide basis. But determining whether a common statistical method exists for measuring damages on a class-wide basis necessarily requires district courts to undertake a careful and exacting economic analysis. Most importantly, this analysis must be grounded in the facts adduced in class discovery and expert testimony at the class certification stage.

2. Regression analysis is an econometrics tool that can often provide a common method for measuring damages on a class-wide basis in Rule 23(b) class actions. But regression models must themselves be subjected to rigorous economic testing to ensure that they are a reliable means of proving damages on a class-wide basis in a given case.

The necessary testing of the reliability of a regression model can be accomplished through relatively straightforward and simple empirical methods that meet the standards of utility, established acceptance in the field, and reliability prescribed by *Daubert*. One reliable method is to have the proposed regression model run on both the class as a whole and separately on one or more sub-groups of the putative class. The results of those separate models are then compared to the results provided when the regression model was run class-wide. If this comparison shows a statistically significant difference between the sub-groups and the

class, then the class-wide regression model does not provide a sound method for measuring damages on a class-wide basis. In the absence of this type of testing and scrutiny, the regression analysis may mask critical distinctions among the putative class members, thus rendering the analysis unreliable.

Empirical testing of the regression analysis in this manner is neutral. It is neither pro- plaintiff nor pro-defendant, and it makes no assumptions either way about the propriety of class treatment. It is rooted instead in fundamental scientific principles used to assess the accuracy and reliability of statistical models based on the on-the-ground facts of the particular case. Scientifically reliable and admissible tools of economic analysis thus are readily available by which the parties and court could address the important issues raised with respect to the viability of class-wide damages in this case.

ARGUMENT

I. AVAILABLE ECONOMIC METHODS PROVIDE A SCIENTIFICALLY SOUND FRAMEWORK FOR DETERMINING THROUGH ADMISSIBLE EVIDENCE WHETHER DAMAGES TO PUTATIVE CLASS MEMBERS CAN BE MEASURED ON A CLASS-WIDE BASIS.

A. In Determining The Propriety Of Class Certification Under Rule 23(b)(3), Courts Must Conduct A Rigorous Analysis Of Whether Common Issues, Including Damages Issues, Predominate Over Individual Issues.

Rule 23 of the Federal Rules of Civil Procedure governs the certification of class actions in federal court. That Rule sets forth two sets of class certification requirements.

First, under Rule 23(a), the party seeking certification must show that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). All four requirements of Rule 23(a) must be met; otherwise, the class cannot be certified. *General Tel. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

Second, the proposed class must qualify for one of the three categories of class actions specified in Rule 23(b)(1), (2), or (3). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). The category under which class certification was sought in this case is Rule 23(b)(3). Pet. App. 12a. That Rule provides that a class action "may be maintained if *** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

This Court recently reconfirmed that Rule 23's class certification requirements are not a "mere pleading standard[s]." *Dukes*, 131 S. Ct. at 2551. Unlike Federal Rule of Civil Procedure 12(b)(6), which limits courts at the motion to dismiss stage to the four corners of the complaint, Rule 23 calls on courts at the class certification stage "'to probe behind the pleadings'"—an inquiry that will "'frequently *** entail some overlap with the merits of the plaintiff's underlying claim.'" *Id.* at 2551-2252 (quoting *Falcon*, 457 U.S. at 160). "That cannot be helped" because determining whether Rule 23's requirements are met "'generally involves considerations that are enmeshed in the factual and legal issues'" posed by the claim. *Id.* The Court has stressed, moreover, that the obligation of district courts to go beyond the contours of the pleadings in class certification proceedings requires "'a rigorous analysis'" to ensure that the Rule 23 requirements are in fact satisfied before a class is certified. *Id.* at 2551 (quoting *Falcon*, 457 U.S. at 161).

To be sure, this Court's statements in *Dukes* and *Falcon* mandating a "rigorous analysis" of class certification motions were made with specific reference to Rule 23(a). *Dukes*, 131. S. Ct. at 2551; *Falcon*, 457 U.S. at 161. But there should be "no reason to doubt that what [this] Court [has] said about [the] Rule 23(a) requirements applies with equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3)." *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 33 n.3 (2d Cir. 2006); *see also In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 614, 618 (8th Cir. 2011) (requirement that district courts conduct a "rigorous analysis" before certifying a class applies to Rule 23(b)), *petition for cert. filed*, 80 U.S.L.W. 3378 (U.S. Dec. 15, 2011); *Madison v. Chalemette Refining, L.L.C.*, 637 F.3d 551, 554 (5th Cir. 2011) (same). The same reasons of fairness, efficiency, and judicial administrability for which this Court found exacting analysis to be necessary under Rule 23(a) do not evaporate under Rule 23(b).

Indeed, if anything, Rule 23(b)(3)'s requirement that common issues "predominate" over individualized issues should be "far more demanding" than Rule 23(a)'s requirement that there be questions of law and fact that are common to the class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). That is because the Rule's inquiry into whether common issues "predominate" over individual issues "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *id.* at 623, in a manner that is fair both to the individuals who will be bound by the class judgment and the defendants whose liability to large

numbers of individuals will be adjudicated on a collective basis, *see* Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-103 (1966). Under the predominance inquiry, "it is not sufficient that common questions merely exist, as is true for purposes of Rule 23(a)(2)." 7AA Charles Alan Wright & Arthur R. Miller, *et al.*, *Federal Practice and Procedure* §1778, at 119-120 (3d ed. 2005). What matters instead for purposes of Rule 23(b)(3) is the nature of the overall "relationship between the common and individual issues." *Id.*

Rule 23(b)(3) thus dictates that courts give a class certification motion an especially "'close look.'" *Amchem*, 521 U.S. at 615 (citation omitted). That extra scrutiny complements the procedural protections of Rule 23(b)(3)'s notice and opt-out provisions, which afford putative class members the opportunity to exclude themselves from the class and thus not be bound by the final judgment in the case. *Dukes*, 131 S. Ct. at 2558-2559.

Furthermore, the "rigorous analysis" of a class certification motion that this Court has called for must be conducted with respect to each of the elements of the putative class members' claims and the defenses to the claims. *See Dukes*, 131 S. Ct. at 2551; *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 842 (5th Cir. 2012). That requirement of exacting scrutiny necessarily extends to the element of damages when, as in this case (Pet. App. 96a), that is the class-wide remedy the plaintiffs seek. *See Dukes*, 131 S. Ct. at 2558-2559. Indeed, the need to ensure that the damages claim is susceptible of class-wide litigation and computation is particularly

indispensable in Rule 23(b)(3) actions because that provision was specifically intended to serve as the vehicle for certifying class action damages cases. *See Dukes*, 131 S. Ct. at 2558-2559; *Amchem*, 521 U.S. at 614. Accordingly, as with the common liability issues in a Rule 23(b)(3) class action, the common damages issues must predominate over individual damages issues for the class to be certified.

B. To Satisfy The Predominance Requirement of Rule 23(b)(3), Plaintiffs Must Show That There Is A Common Method By Which To Litigate and Measure Class Members' Damages.

To satisfy the Rule 23(b)(3) predominance requirement with respect to damages, the plaintiff must demonstrate that damages can accurately be measured on a class-wide basis through the use of common proof. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311, 325-326 (3d Cir. 2008); 5 James W. Moore et al., *Moore's Federal Practice*, § 23.45[2][b], at 23-223-23-224 (3d ed. 2012). Because, by definition, individualized damages assessments are not viable, this generally means that the plaintiff must show that there is a uniform methodology by which damages can be computed reliably and fairly for all members of the class.

The most typical way of doing so is through the use of appropriate data and statistical analysis that derive from common evidence and operate evenhandedly and accurately across the class. That type of common methodology can satisfy the Rule 23(b)(3) predominance requirement, even if the

actual calculation of each class member's own damages using the method has to be individually processed. *See, e.g., Sacred Health Sys., Inc. v. Humana Military Healthcare Servs. Inc.*, 601 F.3d 1159, 1179 (11th Cir. 2010); *Ward v. Dixie Nat'l Life Ins. Co.* 595 F.3d 164, 180 (4th Cir. 2010); *In re Hydrogen Peroxide*, 552 F.3d at 325-326; *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 106-107 (2d Cir. 2007); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 303 (5th Cir. 2003); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 40-41 (1st Cir. 2003).[3]

In these and other Rule 23(b)(3) cases, economic analyses conducted by experts have been critical in allowing a court to determine at the outset of litigation whether a common method reliably can be used to measure class members' damages. *See, e.g, In re Hydrogen Peroxide*, 552 F.3d at 315-317; Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 352-353 (2011); John H. Johnson & Gregory K. Leonard, *Economics and The Rigorous Analysis of Class*

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[3] The need for a common method by which damages reliably can be proven on a class-wide basis also ensures that class certification comports with Rule 23(b)(3)'s separate requirement that class treatment be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The absence of such a method would render a class action unmanageable by forcing the district court to preside over as many mini-trials on damages as there are class members. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001); *Fischer v. Dallas Fed. Sav. & Loan Ass'n*, 835 F.2d 567, 570 (5th Cir. 1988).

Certification in Antitrust Cases, 3 J. OF COMPETITION L. AND ECON. 341, 342-343 (2007).

Indeed, it is *amici's* experience that, in heeding this Court's admonition in *Falcon* and *Dukes* to "probe behind the pleadings" at the class certification stage, *Falcon*, 457 U.S. at 160; *Dukes*, 131 S. Ct. at 2551, district courts have come increasingly to rely on economic analyses in Rule 23(b)(3) class actions. That is because the nature of the inquiry has become increasingly complex, particularly in antitrust cases like this one, where courts have to discern the hypothesized "but for" causal impact of one of many potentially influential economic factors on thousands or (here) millions of plaintiffs over a defined period of time. That multi-faceted economic inquiry generally cannot be accomplished reliably—let alone rigorously—without the benefit of empirical testing using proper statistical methodologies.

C. Empirical Economic Testing Techniques Provide A Readily Available Tool For Rigorously Assessing, At The Certification Stage, Whether Class Members' Damages Can Be Proven On A Class-Wide Basis.

1. Empirical Economic Testing Techniques Furnish a Neutral Mechanism For Examining the Commonality of Damages.

The objective of an award of damages in civil litigation is to compensate the injured party for harm that was actually suffered, not to make some

globalized estimate of the harm inflicted. *See Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988). In a civil antitrust case involving allegations of anticompetitive pricing like this case (Pet. App. 7a), the key to proving damages is determining what price the plaintiff would have paid but for the defendant's alleged anticompetitive conduct. Similarly, in an employment discrimination case, the key to proving damages is determining the compensation the plaintiff would have received but for the alleged discriminatory actions of the employer.

Those calculations necessarily require the construction of a hypothetical, counter-factual scenario evaluating what conditions would have existed in the absence of the defendant's alleged actions. In an antitrust case involving allegations of price fixing, the difference (if any) between the counter-factual "but-for" price and the actual price the plaintiff paid is the overcharge arising from the defendant's conduct, and that overcharge simultaneously reflects both antitrust injury and the amount of antitrust damages. *See* ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 3-15, 53-55 (2d ed. 2010).

In a class action case, the economic analysis needed to prove impact and damages by hypothesis must be based on a scientific methodology that can be applied reliably on a class-wide basis to measure *actual* individual harm. That is necessarily a more complex undertaking than proving impact and damage in a single plaintiff case because it involves identifying a common method, based on the use of aggregate data, that remains capable of yielding a

reliable "but for" result for different individuals, notwithstanding their varying circumstances.

Fortunately, as demonstrated in Sections C.3 and C.4, *infra*, courts can now critically evaluate the viability of a common method for measuring class-wide damages through the use of existing empirical testing techniques in the field of economics. Those tests are available at the class certification stage because they rely upon facts that can be adduced in discovery related to class certification. *See, e.g., Initial Public Offerings Sec. Litig.*, 471 F.3d at 41 (although districts courts have discretion to impose some limits on discovery at the class certification stage, they "must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met").

Most importantly, those techniques operate evenhandedly. Put another way, they are neither pro-plaintiff nor pro-defendant. They simply provide a neutral, scientific mechanism for assessing when class-wide damages can, and when they cannot, be computed accurately. The outcome turns objectively on the underlying facts bearing on damages to which the techniques are applied. Testing of this sort is consistent with the fundamental scientific and evidentiary principle that competing propositions should be evaluated based solely on their grounding in the facts.

2. *Empirical Economic Testing Techniques Have Sufficient Utility and Reliability to be Admissible as Expert Evidence.*

There is simply no economic or scientific reason why determinations addressing the viability of class-wide damages calculations should be based on the type of questionable economic evidence provided by the plaintiffs in this case, or for courts to postpone careful examination of the viability of class damages beyond the class certification stage. There are readily available to courts and parties scientifically proven, reliable, and objective economic methods for evaluating damages claims that satisfy the admissibility standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See, e.g., In re Hydrogen Peroxide*, 552 F.3d at 323 (discussing application of *Daubert* at class certification stage).

This Court has not squarely addressed whether *Daubert* applies to expert testimony at the class certification stage. In *Dukes*, however, this Court "doubt[ed]" whether the law could be otherwise. 131 S. Ct. at 2553-2554 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. *** We doubt that is so[.]").

In *amici's* view, the Court's suggestion in *Dukes* is correct. If expert testimony is introduced in support of, or in opposition to, a class certification motion, a court must necessarily decide whether, under *Daubert*, the expert is qualified and his or her testimony is reliable; otherwise, the court cannot

fully carry out this Court's mandate to conduct a rigorous analysis of the Rule 23 certification requirements. In other words, as the dissenting judge in the court of appeals recognized, a *Daubert* analysis of expert testimony on whether "the elements of a claim are capable of proof through evidence common to a class" goes hand-in-hand with the need for a district court to probe behind the face of the pleadings and touch upon the merits of the claim. Pet. App. 66a n.18 (Jordan, J., dissenting). *See American Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010) (per curiam) (district court's obligation to "make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification" inexorably extends to determining if expert testimony on certification is reliable under *Daubert*); *Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d at 628 (Gruender, J., dissenting) ("Requiring a full *Daubert* analysis is a natural extension of the concept that class certification should not be conditional and should be permitted only after a rigorous application of Rule 23's requirements.").

But whether or not *Daubert* is the appropriate reference point legally, in *amici*'s judgment, there is no scientific or economic reason to settle for less than that high-quality standard as the guide for the critically important and consequential decisions that courts make at the class certification stage.

3. Rigorous Economic Testing Is Necessary to Ensure the Reliability Of Regression Analysis Models for Class-Wide Damages Claims.

The viability of class-wide damages comes down to the fundamental question of whether there is an accepted, scientifically reliable method for calculating both the fact and the extent of injury, and hence damages, on a class-wide basis that relies with accuracy on common proof, rather than evidence that is unique or individual to each class member.

a. Econometrics, "the application of statistical methods to the study of economic concepts," can provide that critical analysis and identify whether there is, in a particular case, an available means for class-wide computations. Daniel L. Rubinfeld, *Econometrics In The Courtroom*, 85 COLUM. L. REV. 1048, 1048 n.2 (1985). More specifically, regression analysis is a statistical tool commonly employed by econometricians in the damages context, and is now familiar to courts. *See, e.g.*, *ATA Airlines, Inc. v. Federal Express Corp.*, 665 F.3d 882, 889-890 (7th Cir. 2011) (Posner, J.) (discussing application of regression analysis to show asserted damages in breach of contract action), *petition for cert. filed*, 80 U.S.L.W. 3669 (U.S. May 22, 2012).

Simply put, regression analysis is a methodology that identifies and measures the causal effect of one factor on another variable. *See* Alan O. Sykes, *An Introduction to Regression Analysis*, Univ. of Chicago Lectures in Law & Economics 1, 1 (E. Posner ed. 2000). That analysis makes it possible to estimate with scientific confidence how a given dependent

variable (such as compensation) will change as the underlying independent variables (such as years of experience, education, and, in the case of a discriminatory action, race, gender, or similar prohibited factor) change.

Regression analysis is now commonly used in class actions as a means to show the damages caused by allegedly anticompetitive conduct in antitrust cases, or the effect of race or gender on the terms and conditions of employment in an employment discrimination case. *See* Pierre Cremieux, *et al.*, *Proof of Common Impact in Antitrust Litigation: The Value of Regression Analysis*, 17 GEO. MASON L. REV. 939, 945 (2010) ("[T]he relevant regression estimates isolate and quantify the effect of the alleged antitrust violation."); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 150-151 (2009) ("The principal means for identification of such a [discrimination] pattern takes the form of statistical analysis of the defendant employer's workforce in the aggregate, with the use of regression techniques to isolate the effect of the Title VII-prohibited variable within the array of nonprohibited variables that might influence such matters as pay and promotion.").

In an antitrust case, the plaintiffs might use a regression analysis to show that a certain percentage of an increase in the price of (for example) oranges was caused by price fixing rather than cold weather or other causes of crop reduction. In some cases, a regression analysis could provide the necessary common method for measuring damages to the putative class of orange purchasers.

b. But regression analysis only works if it is based on valid assumptions. If the predicates for the analysis are inappropriate, then the analysis will yield an unreliable and misleading result concerning the commonality of predicted effects across the class. *See* John H. Johnson & Gregory K. Leonard, *Rigorous Analysis of Class Certification Comes of Age*, 77 ANTITRUST L. J. 569, 580-581 (2011). To illustrate, if a regression model assumes that a price increase for oranges applies to all orange purchasers in the same way, even though some orange producers actually have long-term contracts with fixed prices and other orange purchasers do not, then the model can yield an inaccurate common answer that incorrectly measures how the individual purchases of oranges were actually harmed. *See* Johnson & Leonard, *Rigorous Analysis*, *supra*, at 346. In other words, a regression analysis in that case might suggest that the harm from the alleged price fixing by orange growers affected the entire class of orange purchasers in a way that can be proven with evidence common to the class, when common proof may not be available because the orange purchasers within the class are not, in fact, similarly situated.

Fortunately, flaws like that (or perhaps like those that are asserted with respect to the plaintiffs' expert's analysis in this case, *see* Pet. Br. 44a-49a) can themselves be exposed through empirical testing. If the regression model, as applied to a sub-sample of data (such as the orange growers with long-term contracts), yielded demonstrably different results in its prediction of actual outcomes than the class-wide regression model, then the class-wide model would also be an unreliable predictor of "but for" damages

for the entire class. And if the flaws in the model cannot be rectified by, for example, specifying separate models for sub-classes, or including an independent variable that measures the effect of long-term contracts, the case is not susceptible to an award of damages on a class-wide basis.

Accordingly, appropriately employed and well-established economic analyses—particularly those that employ reserved sample groups to verify the testing model—are available for courts and litigants to vigorously examine, at the early class certification stage, whether class damages can genuinely and accurately be assessed on a class-wide basis.

c. Rigorous testing of regression models at the class certification stage can also reveal whether industry-specific economic conditions may affect the ability to prove damages on a class-wide basis. For instance, in some industries, supply and demand conditions may be sufficiently homogenous that a regression model showing the impact of the challenged conduct can provide common proof of class-wide damages. *See* Johnson & Leonard, *Economics and the Rigorous Analysis*, *supra*, at 345.

As economic scholarship has shown, however, supply and demand conditions in many industries are heterogeneous and multi-faceted. *See* Steven Berry, *et al.*, *Automobile Prices in Market Equilibrium*, 63 ECONOMETRICA 841 (1995); Guido W. Imbens & Jeffrey M. Wooldridge, *Recent Developments in the Econometrics of Program Evaluation*, 47 J. OF ECON. LITERATURE 5 (2009); James J. Heckman, *Microdata, Heterogeneity, and the Evaluation of Public Policy*, Nobel Memorial Lecture, 2000, *available at*

http://athens.src.uchicago.edu/jenni/econ311_2002/nobel_text.pdf. Thus, if market conditions vary widely, it will be more difficult to estimate damages or impact on a class-wide basis.

In short, in order to determine whether a putative class's damages can be established through common proof, a district court must be able to assess whether a given regression model's assumptions of common impact match the relevant facts on the ground in the relevant industry. *See* Johnson & Leonard, *Economics and the Rigorous Analysis*, *supra*, at 345 ("[B]efore using a specific economic theory, one must check to make sure it actually applies to the case at hand.").

It is not enough for a court to conclude that a regression model is, in a factual vacuum, scientifically sound. The rules of evidence and *Daubert* are more meaningful than that. *See* Fed. R. Civ. P. 702(d) (expert witness may testify if "the expert has reliably applied the principles and methods to the facts of the case"); *Daubert*, 509 U.S. at 589, 597 (district court must serve "gatekeeping role" of "ensur[ing] that any and all scientific testimony or evidence admitted is not only relevant, but reliable"). The model must instead be shown to fit and to operate reliably within the factual realities of the case.

4. Available Statistical Testing Can Assess Whether a Proposed Regression Model Provides a Reliable Means of Proving Class-Wide Damages.

Courts can use available statistical models for empirical economic testing to determine with the

scientifically required rigor whether a proposed regression model fits the facts of the case. In the damages context, the purpose of such testing is to assess whether the regression model reliably estimates damages suffered by the victims of the alleged unlawful conduct (such as price fixing or discriminatory employment policies) in a common manner across the class.

a. One of the best statistical tests available entails running versions of the regression model on a reserved sub-sample of the putative class members. This is a relatively straightforward process. After a regression model is run class-wide, the model is then re-run against a sub-sample of the class. When the results of the class-wide test are compared to the results from the sub-sample model, economists can determine whether the class-wide model's assumption of common impact holds—that is, whether individual members are harmed at all, or to approximately the same degree, as the class-wide regression model would predict. *See* Michael O. Finkelstein and Hans Levenbach, *Regression Estimates of Damages in Price-Fixing Cases*," 46 *Law and Contemporary Problems* 145, 158 (1983).

If the results yielded by regression analysis for the sub-class differ in a statistically significant way from the results yielded for the entire class, then the class-wide model is not a sound method for estimating damages

In the orange-purchaser hypothetical, for example, the putative class representative might introduce a regression model that shows that orange

prices increased by five cents due to an overcharge, taking into account all other relevant factors (such as weather and imports). Running the model separately for sub-samples of individual class members, however, might reveal that in fact there is no commonality because half of the class (the long-term contract holders) paid no overcharge at all, and others paid widely varying overcharges.

Econometrics thus teaches that to test the proposition that the class-wide regression model is reliable, the model should be run separately on sub-samples to determine whether the general results mask statistically significant differences across sub-classes. If those steps are not performed, as they may not have been here, then all a court could determine from the general regression model is that, at most, prices increased on average due to an overcharge. In such circumstances, however, the court would have no scientifically reliable evidence that the regression model can, in fact, provide common proof of damages for each class member. The science, indeed, might well show the opposite. *See* Cremieux, *supra*, at 948 ("In general, an expert opining on class certification issues should test, rather than assume, that the effects of an alleged violation are common across products and other relevant dimensions."); *see also* Johnson & Leonard, *Economics and the Rigorous Analysis*, *supra*, at 351 ("[I]t would not be generally accepted among econometricians to claim that a reliable regression could be run in a given context without first examining the data, actually running regressions, and conducting econometric tests on those regressions.").

b. Based on *amici's* work in numerous class certification proceedings, the relevant facts and datasets needed to conduct this type of empirically sound inquiry—such as transaction sales data (including information on prices charged and quantities purchased) and information on the supply and demand conditions in the industry in question—are routinely available through class certification discovery. That means that applying these scientifically sound and well-accepted regression models in the proper manner will not require changing the rules of class certification discovery or even intruding unduly into the merits of a case. Instead, relying only on the information obtained through discovery, scientifically sound empirical testing methods can establish whether, and to what extent, damages are capable of measurement on a class-wide basis using common proof.

A hypothesized price fixing case illustrates the methodology. The allegations are that the sellers conspired to fix the prices for a polymer resin. This resin is used by both automobile parts manufacturers and airplane parts manufacturers. The plaintiff might submit a regression model that assumes that each purchaser paid the same overcharge. In this example, the average would accordingly be calculated over the entire proposed class, including automobile parts manufacturers and airplane parts manufacturers. That common regression model would take class-wide data, from all purchasers in the class and calculate an average overcharge that is allegedly caused by the defendant's anticompetitive conduct, taking account of other market data in the industry as independent variables.

Suppose, however, that automobile parts manufacturers could easily substitute a ceramic material for the resin, should the resin prices increase, while airplane parts manufacturers have no feasible alternative. Because the automobile parts manufacturers can, without much difficulty, switch to an alternative, they have bargaining power with the resin sellers as well as alternative supply sources if costs get too high. They may, therefore, be able to avoid paying the overcharge. Running the regression model separately with just the automobile parts manufacturers' data would reveal whether the automobile parts manufacturers in fact paid any overcharge or whether the overcharging operated disparately on different sub-groups within the proposed class. When individual purchaser data is run through the model, it thus may show that none of the prices automobile manufacturers paid for polymer resin can be attributed to anticompetitive conduct.

That straightforward statistical testing demonstrates that the proposed common-proof methodology in the hypothetical polymer resin price fixing case is an unreliable measure of the overcharge for any particular class member and also an inaccurate sizing of the damage pool. Testing has exposed that the proposed common-damages methodology did not take account of an important structural difference between different purchasers in their responsiveness to price changes. Specifically, the overcharge measurement is unreliable because the average is calculated over the entire proposed class, which includes automobile parts manufacturers whose ability to switch to another

product, in fact, had insulated them from the overcharge.

In addition, the size of the damage pool—and the composition of the class—is inaccurate because it includes automobile parts manufacturers who did not suffer damages in common with other class members but, in fact, may have incurred no or markedly reduced damages. Further testing through the running of separate regression models for automobile parts manufacturers and airplane parts manufacturers would provide reliable evidence to the district court to allow it to correctly delineate the class in a way that includes only those purchasers that actually sustained damages, and to avoid the use of damages models that, while ostensibly "common," are not scientifically accurate or reliable under the circumstances of the particular case.

Such empirical testing does not prejudge the availability, or lack thereof, of a common proof model in any given case. Rather, it uses the fundamental scientific approach of statistical testing to assess the accuracy and reliability of a predictive model, rather than merely assuming the answer to the question of whether common proof is available. That is vital because the validity of an economic analysis in the abstract is of no help if its application in a particular case is ill-fitted and unreliable. Courts thus need to use the economic tools at hand to ensure that genuine and durable commonality exists in the proof of damages across the entire proposed class. In *amici*'s view, such verification of regression models at the class certification stage is not only necessary for scientific reliability, but also beneficial because it provides a straightforward method of answering the

economic and computational questions facing the district court as it attempts to determine, under the rigorous analysis required by this Court, whether common issues predominate in a putative Rule 23(b)(3) class action.

D. District Courts Are Well-Equipped To Evaluate Empirical Evidence On Whether Damages Can Be Proven On A Class-wide Basis.

Such scientifically sound testing of economic models has increasingly proven its worth in identifying when and to what extent the damages of putative classes are susceptible to common proof on a class-wide basis. District courts have shown themselves adept at comprehending the economic evidence and analyses presented by the parties and making reliable determinations, based on admissible evidence, regarding the availability of common proof of impact and damages.

For example, in one antitrust case, a class action of graphics card purchasers was proposed that included both consumers and large wholesale purchasers (*i.e.*, computer manufacturers and retailers like Best Buy). In that case, the district court reviewed regression and correlation models that disaggregated large purchasers, consumer purchasers, and different products. *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 493-495 (N.D. Cal. 2008). From that review, the district court was able to conclude that the averaging in the plaintiffs' common correlation model "masked important differences between products and purchasers" and, when the individualized data were

reviewed, "any supposed correlation evaporate[d]." *Id.* at 494.

Accordingly, the district court in *Graphics Processing* declined to certify the entire class, but determined that common issues did predominate, and common proof of impact and damages was available, for "a more limited class" of individuals who purchased graphics card directly from defendants online. 253 F.R.D. at 497. Empirical testing of the proposed common regression model against a sampling of individual purchasers thus provided the district court reliable evidence from which it could determine the appropriate scope of a class for which common issues did predominate. That approach afforded the plaintiffs the benefits of aggregate litigation for the properly qualified sub-class while protecting putative class members, the defendant, and the court from the toll exacted on the judicial process by the overly broad class adjudication of factually disaggregated claims or injuries.

In other cases, district courts have used empirical testing to determine that a common model of damages did not hold for the vast majority of class members and accordingly that the class could not be certified. In one case, the plaintiffs developed regression models that "'grouped or pooled'" all of the individual transaction data to develop "industry-wide regression results." *In re Plastics Additives Antitrust Litig.*, No. 03-CV-2038, 2010 WL 3431837, at *15-16 (E.D. Pa. Aug. 31, 2010) (citation omitted). The district court relied on "regressions for a sampling [of] individual *** class members," using the regression model proposed by plaintiffs, to conclude that "the single estimates produced by [the plaintiffs']

regressions are in fact not representative of individual class member experience." *Id.* at *16 (citation omitted). Accordingly, the models did not present a scientifically reliable method for establishing impact through common proof. *Id.* at 19; *see also Reed v. Advocate Health Care*, 268 F.R.D. 573, 591-592 (N.D. Ill. 2009) (finding "'fundamental flaw'" in regression model relying on averages and "result[ing] in a single estimated average percentage of [wage] suppression to be applied to all nurses in the class" when there was evidence "that the changes in defendants' average base wages did not move in parallel") (citation omitted).

Individualized analysis, on the other hand, sometimes confirms that "data variation" across the class "is not so extreme as to mask the absence of injury for a significant number of class members." *In re Flonase Antitrust Litig.*, No. 08-CV-3301, 2012 WL 2277840, at *20 (E.D. Pa. June 18, 2012). In *Flonase*, the regression model was tested for "all three types of class members" to determine "whether [the] methodology was robust in assessing impact," and was also tested against the individual data for each named plaintiff. *Id.* From that testing, the district court was able to conclude that the class had "shown that impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* at *21.

In sum, empirical testing of the sort employed by the district courts in the cases canvassed here has provided a scientifically accepted means by which district courts can hew to the requirements of Federal Rule of Civil Procedure 23(b)(3) and *Dukes* while rigorously analyzing whether a proposed model

for common damages actually fits the facts of the case and adequately captures the economic characteristics of the putative class.

Those models, moreover, have the level of scientific reliability and acceptance in the field to meet *Daubert*'s admissibility standards, thereby ensuring that the vitally important class certification judgment is made with the exactitude judgments of such consequence warrant.

In addition, because the models require only the type of information already obtained through class certification stage discovery, district courts can employ such testing to determine, at an early stage in the litigation, whether a proposed class-wide damages model accurately provides a method of proving damages that relies on common proof. Conducting this inquiry at the outset enables district courts to "right size" classes early, and to reach scientifically reliable conclusions regarding predominance in Rule 23(b)(3) class actions in a manner that is fair to all parties, absent class members, and the integrity of the judicial process itself.

CONCLUSION

Whatever the appropriate answer to the question presented under the law, the economic tools necessary to accurately assess through admissible expert evidence the viability of class damages claims at the class certification stage are readily available for courts to employ.

Respectfully submitted.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The brief supports the Petitioners and urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively provide employment to roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Comprising potential defendants to large-scale employment class action litigation, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issue presented in this case regarding the type of analysis a district court must undertake in deciding whether class certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure. EEAC is especially concerned with the panel majority's erroneous conclusion that district courts may not reconcile conflicting expert and other evidence at the class certification stage because doing so would amount to a merits-based review in contravention of this Court's reasoning in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

The panel majority's decision below effectively rejects the "rigorous analysis" standard for district court review of class certification motions established by this Court in *General Telephone Co. of the South-*

west v. Falcon, 457 U.S. 147 (1982), and reaffirmed last term in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), by requiring only a minimal evidentiary showing by plaintiffs that their claims meet the threshold requirements of Rule 23. Such a rule, if permitted to stand, would allow class certification of virtually any well-pled complaint, thus undermining the purposes of the class action tool and profoundly disadvantaging the employers having to defend such actions.

Since 1976, EEAC has participated in numerous cases in this Court raising substantive and procedural issues related to litigation of employment discrimination claims, including the proper interpretation and application of Rule 23.[2] Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers in particular.

STATEMENT OF THE CASE

Respondents are six non-basic cable television customers of Comcast. Pet. App. 5a. In 2003, they filed an action in the U.S. District Court for the Eastern District of Pennsylvania accusing Comcast of engaging in anti-competitive business practices that resulted in customers having to pay more for cable service, in violation of the Sherman Act, 15 U.S.C. §§ 1-2. *Id.* Seeking to represent a class of present and former Comcast cable subscribers in the Phila-

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[2] *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011); *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982); *Gen. Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318 (1980); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977).

delphia area, they moved for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 6a-8a.

On May 3, 2007, the district court certified a Rule 23(b)(3) class, rejecting Comcast's contention that because the plaintiffs' theory of damages could not be established through class-wide proof, class certification was improper. Pet. App. 89a-188a. A divided panel of the Third Circuit agreed, and affirmed the district court's class certification ruling. Pet. App. 2a-52a. Relying on pre-*Dukes* dicta from this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), the panel majority rejected the notion that a trial court is required to resolve the merits of competing expert and other evidence going to the propriety of class certification, declaring that *Eisen* "precludes" such an inquiry. Pet. App. 33a. In doing so, it implicitly rejected the "rigorous analysis" standard established by this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982) and reaffirmed last Term in *Wal-Mart Stores, Inc. v. Dukes*, ___U.S.___, 131 S. Ct. 2541, 2551 (2011) – a decision which it said "neither guides nor governs the dispute before us." Pet. App. 41a.

Judge Jordan dissented in part. Pet. App. 53a. He would have denied class certification on the ground that damages were not capable of being proven using evidence common to the class, noting among other things that the Respondents' argument rests entirely on an expert opinion that should have been deemed inadmissible pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet. App. 68a. Following denial by the Third Circuit of their petition

for rehearing *en banc*, Petitioners filed a petition for writ of certiorari, which this Court granted on June 25, 2012.

SUMMARY OF ARGUMENT

The decision below cannot be reconciled with this Court's repeated command that trial courts conduct a "rigorous analysis" of all evidence offered in support of (and against) class certification so as to ensure that every element required by Rule 23 of the Federal Rules of Civil Procedure has been established by a preponderance of the evidence. Because it evinces, at best, a fundamental misunderstanding of the proper role of district courts in evaluating Rule 23 motions for class certification and, at worst, a blatant disregard for this Court's jurisprudence, the ruling should be reversed and class certification denied.

Last Term, this Court in *Wal-Mart Stores, Inc. v. Dukes* made clear that to the extent a passing statement in its 1974 decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), has been misconstrued by a number of lower courts as prohibiting any merits-based inquiry at the class certification stage, "it is the purest *dictum* and is contradicted by other cases." *Wal-Mart Stores, Inc. v. Dukes*, ___U.S.___, 131 S. Ct. 2541, 2552 n.6 (2011). Indeed, shortly after *Eisen* was decided, the Court suggested that assessing the propriety of class treatment often, if not always, will require an analysis of the underlying merits, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), and declared outright in *General Telephone Co. of the Southwest v. Falcon* that trial courts must conduct a rigorous analysis of the evidence offered on the class certification question, regardless of whether the proof also goes to facts at issue on the merits. 457 U.S. 147 (1982).

The Court did not explain in *Falcon* what an appropriately rigorous analysis should entail. *Dukes*, however, speaks in terms of "'significant proof,'" implying that plaintiffs must establish every Rule 23 element by a preponderance of the evidence, and the district court must resolve any challenge to that evidence, prior to certifying a class. 131 S. Ct. at 2553. *Dukes* also strongly suggests that whenever a request for class certification rests upon controverted expert evidence, the district court must conduct a full *Daubert* assessment prior to certifying the class.

The Third Circuit below failed to hold the district court to those expectations, declining to accord any weight to *Falcon* and explicitly rejecting *Dukes* as inapposite. Instead, it relied exclusively on *Eisen* to conclude, among other things, that district courts may not reconcile conflicting expert evidence at the class certification stage because doing so would amount to a prohibited, merits-based review. All that is required, according to the court below, is that the trial court "evaluate expert models to determine whether the theory of proof is plausible." Pet. App. 44a n.13 (citation omitted). Because "plausible" proof of conduct affecting a class as a whole falls well short of the "significant" proof required by *Falcon* and *Dukes*, however, it plainly is inadequate as a matter of law to support Rule 23 class certification.

A district court's commitment to fully evaluate all evidence going to the propriety of class certification, including the reliability of contested expert testimony, is especially important in the employment context, in which expert testimony regularly is offered as proof that Rule 23's requirements have, or have not, been met. Because the act of certifying a class significantly increases the pressure on a defend-

ant, wary of the substantial, "bet the farm" costs associated with mounting an adequate defense, to settle even questionable class claims, courts must be able to understand and faithfully apply the rules in a manner that ensures consistency and fairness for both plaintiffs and defendants.

ARGUMENT

I. THE DECISION BELOW REFLECTS A PROFOUND DISREGARD FOR THE PROPER ROLE OF DISTRICT COURTS IN EVALUATING MOTIONS FOR CLASS CERTIFICATION UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SHOULD BE REVERSED

The decision below, which embraces an erroneous, "no merits" standard for evaluating the propriety of class certification under Rule 23 of the Federal Rules of Civil Procedure, establishes such a low threshold that it is difficult to imagine a circumstance under which its application would not result in class certification. It departs from decisions of several other courts of appeals and is inconsistent with this Court's admonition that district courts perform a "rigorous analysis" as to whether plaintiffs' evidence supports Rule 23 class certification, and therefore should be reversed.

To maintain a class action in federal court, plaintiffs generally must satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b), of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23. Rule 23(a) permits class certification only when "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the

claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Rule 23(b)(2), in turn, allows certification only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) permits certification where "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

A. This Court's Longstanding Jurisprudence, Up To And Including *Dukes*, Demands That District Courts Undertake A Robust Evaluation Of All Relevant Evidence Bearing On The Propriety Of Rule 23 Class Certification

Last Term, this Court in *Wal-Mart Stores, Inc. v. Dukes* clarified and reaffirmed the well-established principle that district courts must conduct a "rigorous analysis" in evaluating Rule 23 motions for class certification, even if doing so involves an examination of the underlying merits. ____U.S.____, 131 S. Ct. 2541, 2551 (2011). Nevertheless, some courts, including the panel majority below, continue to resist that sensible notion, choosing instead to perpetuate an unfounded yet persistent misunderstanding of a single statement made by this Court in *Eisen v.*

Carlisle & Jacquelin, 417 U.S. 156 (1974), which seemed to suggest that merits-based reviews are off-limits at the class certification stage.

The Court in *Eisen* said there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits" when considering whether or not the requirements of Rule 23 have been met. *Id.* at 177. Shortly after *Eisen* was decided, however, the Court went on to observe that the "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims ... [of which] typicality ... adequacy ... and the presence of common questions of law or fact are obvious examples." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (citation and internal quotation omitted).

Four years later in *General Telephone Co. of the Southwest v. Falcon*, the Court declared more definitively that district courts, in determining whether plaintiffs seeking class certification have met the requirements of Rule 23, must engage in a "rigorous analysis" of the facts presented in support of the request. 457 U.S. 147, 161 (1982). In doing so, it sometimes "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160. *Falcon* thus clarified that the Court's earlier statement in *Eisen*, which on its face seemed to establish a bright-line rule barring merits-based inquiries at the class certification stage, should not be read to prohibit such an inquiry where it "may be necessary." *Id.*

The Court in *Dukes* further sought to dispel the misperception among some lower courts that *Eisen* prohibits merits-based inquiries in assessing Rule 23

motions for class certification. Observing that the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," 131 S. Ct. at 2552 (citation omitted), the Court acknowledged that *Eisen's* no-merits language "is sometimes mistakenly cited to the contrary." *Id.* at 2552 n.6. It said, "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest *dictum* and is contradicted by other cases." *Id.*

1. *Dukes* requires significant proof that all relevant Rule 23 factors have been satisfied

The Court in *Dukes* ultimately ruled that a group of as many as 1.5 million women currently or formerly employed by Walmart[3] could not sue on a class-wide basis for unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, concluding among other things that that the plaintiffs – who alleged a pattern of systemic sex discrimination in pay and promotions across various positions and by different supervisors at thousands of Walmart stores – could not establish commonality, as required by Rule 23(a). It observed:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance

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[3] Wal-Mart Stores, Inc. (NYSE: WMT) is the legal name of the corporation. The name "Walmart," expressed as one word and without punctuation, is a trademark of the company and is used analogously to describe the company and its stores. *See* http://www.walmartstores.com/aboutus/ (last visited Aug. 22, 2012).

> with the Rule – that is, he must be prepared to provide that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."

131 S. Ct. at 2551 (citations omitted).

The Court reiterated that "[c]onceptually, there is a wide gap" between "an individual's claim" (there, of disparate treatment discrimination) and "the existence of a class of persons who have suffered the same injury as that individual ...." *Id.* at 2553. It read *Falcon* as suggesting "two ways in which that conceptual gap might be bridged:" (1) by showing that the defendant applied a selection procedure, like an employment test, to an entire class of individuals; or (2) by producing "'significant proof' that an employer operated under a general policy of discrimination ...." *Id.*

Carried to its logical end, "significant proof" in this context would seem to require that plaintiffs establish every Rule 23 element by a preponderance of the evidence, and the district court resolve any challenge to that evidence, prior to certifying a class. A number of courts of appeals already adhere to that view. *See, e.g., Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228-29 (5th Cir. 2009). As the Second Circuit explained:

> Although we did not use the words "preponderance of the evidence" in *In re IPO* to describe the standard of proof applicable to Rule 23 issues, we in effect required the application of a cognate standard by directing district courts "to assess all of the relevant evidence admitted at the class certification stage," to "resolve[] factual disputes relevant to each Rule 23 requirement," and "[to] find[] that whatever underlying facts are relevant to a particular Rule 23 requirement have been established," notwithstanding an issue's overlap with the merits. Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.

Teamsters, 546 F.3d at 202 (citation omitted).

Sidestepping *Dukes*, and with nary a reference to *Falcon*, the panel majority below conceded that the plaintiffs "must establish that the alleged damages are capable of measurement on a class-wide basis using common proof" in order to establish Rule 23(b)(3) predominance, Pet. App. 34a, but nevertheless declared, "[D]etermining on the merits whether the [plaintiffs' proffered] methodology is a just and reasonable inference or speculative ... ha[s] no place in the class certification inquiry." Pet. App. 47a-48a. It concluded, "[A] district court may inquire into the merits only insofar as it is 'necessary' to determine whether a class certification requirement is met. *Eisen* still precludes any further inquiry." Pet. App. 33a.

Expressly rejecting Comcast's argument that *Dukes* controls, the panel majority determined that the "factual and legal underpinnings of *Wal-Mart* –

which involved a massive discrimination class action and different sections of Rule 23 – are clearly distinct from those of this case. *Wal-Mart* therefore neither guides nor governs the dispute before us." Pet. App. 41a n.12. To the contrary, *Dukes* is directly relevant, if not dispositive, and should not have been disregarded by the court below.

While the underlying dispute in *Dukes* did involve Title VII sex discrimination, not antitrust, claims, the issue before the Court there, as here, was whether the plaintiffs presented adequate proof – including expert evidence – to satisfy Rule 23's class certification requirements. The Court did not decide *Dukes* on the merits, but rather on the procedural Rule 23 question, and the fact that the case was brought under a different federal law is, for all intents and purposes, irrelevant.[4]

Dukes makes clear that *Eisen* no longer should be misconstrued as precluding a merits-based review in determining whether a party seeking class certification has satisfied all of the requirements of Rule 23. The panel majority below thus improperly relied on that discredited interpretation of *Eisen* in condoning the district court's failure to conduct a sufficiently

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[4] Lower courts generally have not ignored this Court's Rule 23 jurisprudence simply because the underlying claims dealt with irrelevant substantive law, *see, e.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 581, 595 (9th Cir. 2010) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (antitrust and securities law)), *rev'd*, __ U.S. __, 131 S. Ct. 2541 (2011); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (same)); *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) (citing *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (employment discrimination)).

robust Rule 23 analysis. In fact, had the lower court adhered to and properly applied this Court's teachings in *Falcon* and *Dukes*, it would have found the district court's Rule 23 analysis of the proffered evidence plainly lacking.

2. Whenever a request for class certification rests upon controverted expert evidence, *Dukes* strongly suggests that the district court must conduct a full *Daubert* analysis prior to certifying the class

Rule 702 of the Federal Rules of Evidence limits the admissibility of expert witness testimony to that which is based on "specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue" and which is both reliable and relevant to resolution of the underlying claims. Fed. R. Evid. 702(a). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court clarified the proper standard to be applied in evaluating the admissibility of expert scientific evidence under Rule 702. There, the Court articulated a framework that vests district courts with "gatekeeping responsibility" for determining "whether the reasoning or methodology underlying the testimony is scientifically valid and ... properly can be applied to the facts in issue." 509 U.S. at 592-93. Its subsequent ruling in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), "clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science." Fed. R. Evid. 702 advisory committee's notes on 2000 amendments.

This Court strongly suggested in *Dukes* that whenever a request for class certification rests on expert evidence, the reliability of which is challenged, the

district court must conduct a full *Daubert* analysis prior to certifying the class. *See Dukes*, 131 S. Ct at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so ...") (citation omitted). The panel majority below disagreed, suggesting that doing so "would turn class certification into a mini trial." Pet. App. 43a-44a n.13. It said:

> We understand the Court's observation [in *Dukes*] to require a district court to evaluate whether an expert is presenting a model ***which could evolve to become admissible evidence***, and not requiring a district court to determine if a model is perfect at the class certification stage. This is consistent with our jurisprudence which requires that at the class certification stage, we evaluate expert models to determine ***whether the theory of proof is plausible***."

Pet. App. 44a n.13 (emphasis added).

Dukes reaffirmed that plaintiffs seeking class certification must present "significant" proof that *all* Rule 23 factors have been met. 131 S. Ct. at 2562. Yet the panel majority, in concluding that the plaintiffs' expert evidence was admissible because it appeared to be "plausible" on its face, embraced a standard that falls far short of that framework. Pet. App. 44a n.13.

By definition, "significant" proof requires that the evidence on which the plaintiffs rely establishes *more* than a plausible case. Indeed, in contrast to "significant" – which is defined as "important" or "momentous", Webster's New World Dictionary, Third Coll. Ed. (1989) – the term "plausible" generally

means "that which at first glance appears to be true, reasonable, valid, etc. but which may or may not be so." *Id.* As Judge Jordan pointed out in his dissent, "a court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything." Pet. App. 66a n.18.

Other courts of appeals have recognized that conducting a careful review of expert evidence offered in support of class certification is critical to ensuring that the plaintiff has satisfied, by a preponderance of the evidence, all of the relevant requirements of Rule 23. *See Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010); *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002). In *In re IPO*, the Second Circuit clarified its views regarding the proper standard for granting class certification in the context of so-called "statistical dueling" between the parties on a Rule 23 factor (there, commonality), abandoning the approach it previously had adopted in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999). 471 F.3d at 39-40. It noted that *Caridad* condemned "'statistical dueling'" between experts based on *Eisen's* purported no-merits-inquiry approach, *id.* at 35, observing that "*Caridad*, by the imprecision of its language, left unclear whether the merits dispute between the experts was not to be resolved at the class certification stage or whether their dispute about a class certification requirement was not to be resolved at that stage." *Id.* (footnote omitted).

The Second Circuit in *In re IPO* repudiated its prior holding in *Caridad*, concluding that judges must resolve those very types of disputes before ruling on whether to certify a class:

> With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.

Id. at 41.

As the Seventh Circuit pointed out more recently in *American Honda Motor Co. v. Allen*, "a plaintiff cannot obtain class certification just by hiring a competent expert. ... 'A district judge may not duck hard questions by observing that each side has some support. ... Tough questions must be faced and decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." 600 F.3d 813, 815-16 (2010) (citation omitted); *see also West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (Accepting at face value a plaintiff's evidence, regardless of the existence of other, conflicting proof, "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

This Court made clear in *Dukes* that plaintiffs seeking class certification must present "significant," not merely "plausible," proof that *all* Rule 23 factors have been met. 131 S. Ct. at 2562. To the extent that the decision below embraces a standard requiring no more than a "plausible" showing that Rule 23

has been satisfied, it is contrary to *Dukes* and therefore must be reversed.

B. A District Court's Commitment To Fully Evaluate All Evidence Pertinent To The Class Certification Question Is Especially Important In The Employment Context, Where Expert Testimony Routinely Is Used To Satisfy Rule 23 Factors

Demanding that district courts fully evaluate all evidence offered in support of class certification, including the reliability of contested expert testimony, is especially important in the employment context, where expert proof routinely is used to satisfy Rule 23. In Title VII pattern-or-practice discrimination claims, for instance, statistical evidence is frequently, if not universally, used to supplement anecdotal evidence of discrimination. As one commenter has observed:

> Systemic disparate treatment cases require plaintiffs to establish a "standard operating procedure" of discrimination. As a result, systemic disparate treatment cases are generally brought as class actions. ... [T]he general policy of discrimination required to achieve class certification tends to overlap with the "standard operating procedure" required to prove systemic disparate treatment. Statistical evidence is often used or even required to meet these class certification requirements.

Paetzold & Willborn, *The Statistics of Discrimination* § 2:7 (West 2011 & Supp. 2012) (footnote omitted).

Indeed, "[i]n the problem of race discrimination, statistics often tell much, and courts listen." *Ala-*

bama v. United States, 304 F.2d 583, 586 (5th Cir.), *aff'd*, 371 U.S. 37 (1962) (footnote omitted). Because they also can be misleading, however, statistics must be used with great precision and care in seeking to establish or defend against allegations of class-wide disparate treatment discrimination. Even this Court, in approving the use of statistics to prove hiring discrimination, cautioned that "statistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977).

The same is true for the use of statistics to establish common questions of Title VII disparate impact discrimination. In order to make out a prima facie case, Title VII disparate impact plaintiffs must be able to point to a specific employment policy or practice that while facially non-discriminatory, as applied, produces a statistically significant adverse impact on the protected group. Statistical adverse impact can fluctuate widely based on a variety of factors, including for instance the specific group to which the statistics are being applied; the level of aggregation (*i.e.*, five years vs. two years of hiring data); and/or the unit of aggregation (*i.e.*, managers in New York vs. managers across the Northeast).

In fact, minor differences in selection rates can appear to be statistically significant when large numbers of individuals are being compared. *See Dukes*, 131 S. Ct. at 2555. For example, suppose a group of female applicants seeks to represent a class of all women who applied for, but were denied, employment with X Company, a nationwide employer. One set of statistics might show that of 200 applicants, 99 out of 100 men and 98 out of 100

women were hired. The difference in selection rates between men (selected at a rate of 99%) and women (selected at a rate of 98%) is statistically insignificant.

As the total number of applicants increases, however, this one percentage point difference in selection rates becomes increasingly significant from a statistical perspective. For instance, if the total number of applicants were 3,200 (1,600 men and 1,600 women), and 99% of the men versus 98% of the women were hired, a statistical analysis using the most common test to measure differences in selection rates would yield a standard deviation of 2.3269, greater than the two standard deviation difference generally used by courts to establish statistical significance. If the total number of applicants were increased to 6,400 (3,200 men and 3,200 women), the selection rate standard deviation would grow to 3.2908.

Statistical evidence of that kind is ubiquitous in Title VII disparate impact litigation, and is routinely subject to challenge from the opposing party's own expert. To the extent that such proof regularly is offered through experts to establish questions of fact or law common to the class as a whole, district courts must be required to closely examine and resolve the competing evidence so as to ensure that class certification is, in fact, proper.

II. IMPROPER CERTIFICATION OF EMPLOYMENT DISCRIMINATION CLASS ACTIONS SIGNIFICANTLY DISADVANTAGES EMPLOYERS, WHO OFTEN ACQUIESCE TO THE PRESSURE TO SETTLE SUCH CLAIMS, REGARDLESS OF THEIR MERIT

A district court's decision on a Rule 23 motion for class certification "is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 310 (citation omitted). As this Court observed in *AT&T Mobility LLC v. Concepcion*, "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." ___U.S.___, 131 S. Ct. 1740, 1752 (2011). Because of the importance of Rule 23 class certification determinations, courts must be able to understand and faithfully apply the rules in a manner that ensures consistency and fairness for both plaintiffs and defendants.

It bears repeating that the potentially ruinous costs associated with defending a class action create enormous pressure on any corporate defendant to settle. The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called "judicial blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (footnote omitted). The improper certification below of this class represents an abandonment of

the traditional role of the courts to act as gatekeepers in eliminating frivolous claims at the certification stage, and ignores the reality that class certification almost invariably leads to a settlement, even in cases of questionable merit.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision of the court below be reversed and class certification denied.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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v.

CAROLINE BEHREND, ET AL.,
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On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF INTEL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Intel Corporation is the world's leading semiconductor manufacturer and a major producer of computer, networking, and communications hardware and software. Given its size, Intel is a frequent target in class action litigation. Intel thus has a significant interest in class action procedures and the Question Presented in this case. Intel participated as *amicus curiae* in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, ___, 131 S. Ct. 2541, 2551 (2011), which should have been dispositive here.

Class certification can transform an ordinary lawsuit into "bet-the-company" litigation, even for a company of Intel's size. Few companies can afford to place that bet—no matter how small the odds are of an adverse judgment—so class certification drives settlement. "Blackmail settlements," as Judge Friendly aptly termed such results, damage Intel and its shareholders, drive up prices, and ultimately harm consumers.

SUMMARY OF THE ARGUMENT

The Court expects district courts to conduct a "rigorous analysis" of class certification. *Dukes*, 131 S. Ct. at 2551. That analysis cannot be satisfied by inadmissible evidence.

Delaying the analysis of admissibility beyond certification is not only the antithesis of rigorous

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[1] Intel submits this brief pursuant to the written consent of the parties, as reflected in letters the parties have filed with the Clerk. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than Intel has made a financial contribution to its preparation or submission.

analysis but imposes unwarranted costs on the parties, the courts, and society, particularly because class certification decisions are very often case-dispositive.

Thus, the Court's precedent and important practical and jurisprudential interests require a negative answer to the question the Court identified for review: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

ARGUMENT

I. Only Evidence That Has Been Found To Be Admissible Satisfies the Court's Rigorous Analysis Requirement

The Court requires "rigorous analysis" of the request to certify a class. *Dukes*, 131 S. Ct. at 2551. To satisfy this standard, the plaintiff must "affirmatively demonstrate his compliance" with Rule 23 and "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.*

The only means to "prove" these "facts" is evidence admissible under the Federal Rules of Evidence. Those Rules govern "proceedings in United States courts," Fed. R. Evid. 101(a), including district court proceedings in civil cases, Fed. R. Evid. 1101(a)-(b). Rule 1101(d) specifies certain proceedings as exceptions, but class certification is not one of them. Congress enacted the Rules, which are to be interpreted in the same way as statutes,

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993), and the "cardinal canon" in statutory interpretation is that "a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *see Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 937-938 (7th Cir. 1989) (using this analysis to determine that the Federal Rules of Evidence apply to class action fairness hearings).

The standard for admissibility of expert evidence is set forth in Rule 702 of the Federal Rules of Evidence. Expert evidence must meet four requirements under Rule 702: the expert's opinion must be (1) relevant; (2) based on sufficient facts or data; (3) the product of reliable principles and methods; and (4) reliably applied to the facts of the case. Scientific evidence that fails Rule 702 is irrelevant and unreliable. *Daubert*, 509 U.S. at 594-95; *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (*Daubert*'s objective is to "ensure the reliability and relevancy of expert testimony"). Such evidence is thus not sufficient to "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. at 2551.

Consistent with this conclusion, most circuits to consider the issue in recent years, and certainly since *Dukes*, have required plaintiffs to demonstrate at the certification stage that expert testimony is admissible under *Daubert*. *See Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 812-13 (7th Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *Sher v. Raytheon Co.*, 419 Fed. App'x 887, 890-91 (11th Cir. 2011); *cf. In re*

Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) (affirming district court's application of a "focused" rather than full *Daubert* analysis).

II. Rigorous Analysis at Certification Serves Important Practical and Jurisprudential Interests

Certification is the stage to determine whether plaintiffs can proffer admissible evidence necessary to establish key common issues such as class-wide damages. Accordingly, in *Dukes*, the Court applied rigorous analysis to the expert reports and the "social frameworks" regression analysis. 131 S. Ct. at 2555.

Putting off relevance and reliability determinations until after class certification "ignore[s] this basic truth about class action litigation: the fight over class certification is often the whole ball game." *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1294 (11th Cir. 2006); *see* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006) ("[A]ll sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis . . . result in settlements."). Unfortunately, a post-certification settlement is often "induced by a small probability of an immense judgment in a class action"—what Judge Friendly referred to as "blackmail settlements." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

Allowing district courts to decide the critical certification stage on the basis of what could turn out to be irrelevant and unreliable evidence would encourage the use of superficial expert conjecture to accomplish certification. It would lead to certification in some cases where there was no scientifically acceptable method to prove on a class-wide basis damages or other elements necessary to class treatment, potentially forcing defendants to consider paying out class settlements in meritless cases.

It is not just defendants such as Intel that suffer from blackmail settlements. Class action litigation is often used for, or has the effect of, creating or enforcing policy choices that affect all of society. *See* Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 Geo. L.J. 295, 328 (1996) ("[M]ass torts more closely resemble the issues of broad public concern that constitute the daily business of the administrative state."). Regardless of whether that is acceptable in a representative democracy, surely the costs and risks of class litigation should not drive implicit policy decisions where the basic scientific integrity of the plaintiffs' position has been assumed.

This case illustrates how delaying the application of Rule 702 and *Daubert* can impose costs on others who are not parties to the litigation. The methodology for establishing class-wide damages advanced by plaintiffs in this case threatens to deter legitimate competition because the expert's model included damages from all sixteen counties in which Comcast operated, despite the fact that the expert assumed that no damages in eleven of those counties

were from reduced overbuilding—the plaintiffs' only surviving theory of impact. *See Behrend*, 655 F.3d at 218 (Jordan, J., dissenting). Furthermore, the analysis, which was designed to cover all of plaintiffs' theories, was "incapable of identifying any damages caused by reduced overbuilding." *See id.* at 214-15. This overbroad, ill-fitting model risks the inclusion of "damage" resulting from "superior product, business acumen, or historic accident," *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), or even simple lack of skill, interest, or capacity by competitors. Given this risk to competition, the proposed methodology should be evaluated as soon as possible. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (reviewing the sufficiency of a plaintiff's flawed competitive injury evidence instead of remanding, in light of "the benefits of providing guidance concerning the proper application of a legal standard"). Courts certainly should not allow a speculative methodology to drive class certification, which might lead to a blackmail settlement and prevent the court from protecting the public from acceptance of a flawed model that mistakenly treats legitimate competition as causing antitrust injury.

Although postponement usually eliminates the evaluation of relevance and reliability completely, a few cases will not settle, and defendant's *Daubert* challenge will eventually result in decertification or judgment on the merits years after certification. But postponing *Daubert* until that stage wastes judicial and party resources. Such a "'basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)

(omission in original) (quoting 5 Wright & Miller § 1216, at 233–234).[2]

Delay in the admissibility analysis also undercuts Congress's decision to create a permissive interlocutory appeal as a means of reducing the pressure to settle improperly-certified cases. *See* Fed. R. Civ. P. 23(f). As this case shows, a Rule 23(f) appeal cannot meaningfully review the appropriateness of class certification when the district court postpones, or is presumed to have postponed, a critical part of the Rule 23 analysis. *See Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185 (3d Cir. 2006) (certification order must include "precise parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis").

Similarly, ducking the question of the admissibility of expert testimony at the certification stage stymies creation of a concrete plan for adjudicating the remainder of the action, an all but essential test of the suitability of a case for class treatment. *See* ALI, PRINCIPLES OF THE LAW OF

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[2] For example, in *In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 30 n.16 (D. Mass. 2008), the district judge certified a class without performing a *Daubert* analysis, even though the plaintiff's expert's testimony had been recently excluded from another case on a basis similar to defendant's challenges. Three years later, defendants won summary judgment as a result of the delayed performance of the *Daubert* analysis. *See Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Bos.*, ___ F. Supp. 2d. ___, 2012 WL 118486, at *9 (D. Mass. Jan. 13, 2012); *see also Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 485 (C.D. Cal. 2008) (applying *Daubert* and decertifying a class nearly four years after certification), *aff'd*, 639 F.3d 942 (9th Cir. 2011).

AGGREGATE LITIGATION § 2.12 (2010) ("[T]he court should adopt an adjudication plan that explains . . . the procedures to be used in the aggregate proceeding to determine the common issue . . . ."). Deficiencies in an expert's model and application, unlike hearsay or authentication issues, are not the type of evidentiary flaws that more fact discovery or other case developments typically can remedy.[3] The possibility that expert testimony will evolve, in some unspecified fashion by some unspecified stage of the proceedings, is neither concrete nor a plan.

That is not to say that certification is proper if conditioned on a plan to later test the admissibility of the necessary evidence. Congress amended Rule 23 in 2003 to end conditional certification, and a "court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23(c)(1) advisory committee's note. "A party's assurance to the court that it intends or plans to meet the requirements is insufficient." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008).

III. The Court of Appeals Erred in Disregarding the Requirements of *Dukes*

Expert testimony was the cornerstone of plaintiffs' contention that damages could be determined on a class-wide basis, *Behrend*, 655 F.3d

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[3] Of course, if a plaintiff cannot meet the certification burden, but can demonstrate the need for additional discovery to meet Rule 23's standards, the court may grant time to do so, but should also delay determination of class certification.

at 200, but the panel majority refused to evaluate the model's scientific relevance and reliability under *Daubert*, *id.* at 204 n.13. Apparently seeking to avoid duplication with resolution of the merits, and abjuring "perfect[ion]," the panel regarded Comcast's attack on the validity of "Plaintiffs' proposed damages calculation methodology" as "prematurely attack[ing] the merits of the model." *Id.* at 203; *see id.* at 206 (litigation had not reached stage of determining whether methodology is speculative); *id.* at 207 ("attacks on the merits of the methodology . . . have no place in the class certification inquiry"). Instead, the majority allowed class certification to be based on possibly inadmissible scientific evidence because it presumed that the district court had "likely determined" that the expert analysis "could evolve to become admissible evidence." *Id.* at 204 n.13.

It was error to refuse to apply *Daubert* due to fear that doing so would duplicate resolution of the merits. The district court must assess relevance and reliability of the expert testimony at some point. If the court decides those issues at class certification, then it typically need not revisit them in any depth at trial. As the Court in *Dukes* understood and accepted, attacks on expert testimony that do not disqualify the testimony under *Daubert* can be used to attack the weight of the testimony on the merits. *See* 131 S. Ct. at 2551. But that "frequent" overlap is not duplication of the *Daubert* test, and the overlap is a necessary consequence of rigorous analysis. *Id.* at 2551, 2552 n.6; *see In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (rejecting the idea that "a district judge may not weigh conflicting evidence and determine the existence of a Rule 23

requirement just because that requirement is identical to an issue on the merits").

Nor is it a valid objection that *Daubert* would "requir[e] a district court to determine if a model is perfect at the certification stage." *Behrend*, 655 F.3d at 204 n.13. *Daubert* does not require perfection, it only requires that economic or other expert evidence meet basic scientific and legal standards designed to ensure relevance and reliability. *Daubert*, 509 U.S. at 594-95; *see Kumho Tire*, 526 U.S. at 147. Expert testimony that fails *Daubert* is not imperfect; it is valueless and in fact dangerous, both to fair adjudication for the defendant and to society.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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August 24, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-864

In the Supreme Court of the United States

COMCAST CORPORATION, ET AL.,

Petitioners,

v.

CAROLINE BEHREND, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The question presented in this case is of crucial importance to the retail industry, which stands on the front line of class-action litigation in virtually every jurisdiction nationwide. Major retailers are subject to a steady barrage of cases that rely upon

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[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission. Petitioners and respondents have filed blanket letters of consent to the participation of *amici curiae*.

novel and sometimes dubious theories seeking to achieve class-action status. The reason plaintiffs and their lawyers are so eager to obtain class certification is simple: Class actions almost always settle before they are subject to adversarial testing in the courtroom. Modern class actions are large, expensive, and highly unpredictable—so much so that rational corporate decisionmakers can seldom afford to do anything but settle. Class certification, simply put, is the ballgame.

Accordingly, diluting the requirements set forth in Fed. R. Civ. P. 23 imposes a crippling and unwarranted burden that retailers in this economy can scarcely afford. The requirement that a proposed class adduce significant, admissible evidence to show that damages may actually be proved on a class-wide basis represents a reasonable safeguard against abuses of the class-action device. Essentially, the decision below undermines this Court's holding in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), and disregards the principle that courts must rigorously analyze the facts and plaintiffs must introduce admissible evidence that the case is amenable to an award of damages on a class-wide basis before certification. RLC and its members thus have a significant interest in ensuring that this and related standards under Rule 23 are fully enforced.

SUMMARY OF ARGUMENT

I. A. The decision below represents a serious threat to defendants who face class-action lawsuits on a daily basis. The panel majority's decision

remakes what is supposed to be a "rigorous analysis" of the Rule 23 certification criteria into a dangerously low standard that virtually any group of plaintiffs could satisfy. According to the court below, an expert's conclusion that damages can be proved on a class-wide basis not only is immune from a threshold showing of admissibility under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but also may be riddled with other inadequacies and weaknesses. So long as an expert's theory could "evolve" into admissible evidence, the panel majority concluded, it passes muster. Moreover, an expert need not connect a theory of damages to a particular theory of injury, and even openly "speculative" conclusions are permitted at the class-certification stage. A standard with so many gaping holes is no meaningful threshold at all.

B. Remarkably, the decision below pays almost no heed to this Court's recent pronouncement in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). The district court in *Dukes* had concluded, like the decision below, that *Daubert*'s admissibility requirements did not apply at the certification stage; this Court expressed "doubt" about that conclusion. From that guidance, the panel majority somehow drew the opposite conclusion that expert evidence need *not* be admissible, but merely be capable of "*evolv[ing]* to become admissible evidence." The decision below also overlooked the probing examination of the plaintiffs' expert evidence in *Dukes*. Indeed, the very sort of analysis this Court undertook in *Dukes* would have been dismissed as premature by the panel majority.

II. A. The decision below justified its lax standard on the assumption that defects in an expert's methodology would be addressed later in the litigation. In the real world, that opportunity seldom exists. It is widely recognized that most class actions settle after certification. The risks of trying thousands of claims in a single lawsuit often are too great for rational corporate decisionmakers to bear. That is true even where the merits of the underlying case are weak, because even a single error in determining liability may have catastrophic consequences and because the direct and indirect costs of defending such an action can be overwhelming. In short, plaintiffs who succeed in certifying a class are almost always able to extract what Judge Friendly aptly termed a "blackmail settlement."

B. The pressure to settle would be even greater if the rule adopted below were affirmed. By expressly condoning "evolv[ing]" expert theories—even those that fail to connect injury and damages or are otherwise "speculative"—the decision below introduces still further uncertainty when evaluating a case for purposes of trial or settlement. Defendants will be unable to meaningfully analyze plaintiffs' expert theories, and plaintiffs likewise will not be forced to undertake a candid evaluation of their own cases. Shifting theories make for uncertain outcomes, and uncertainty coerces unwarranted settlements.

III. Requiring admissible evidence is an important protection against abuses of the class-action device. Retailers and other large businesses

face a constant stream of class-action lawsuits. Those lawsuits frequently invoke novel or aggressive theories of class-wide liability and damages, often requiring significant expert evidence regarding whether the claims can be properly certified. The exceedingly permissive standard adopted below opens the door to further attempts to shoehorn cases into Rule 23 that have no business proceeding as class actions.

ARGUMENT

I. The Third Circuit's Standard Is Dangerously Lax And Squarely At Odds With *Dukes*

While paying lip service to the principle that district courts must undertake a "rigorous analysis" of Rule 23(b)(3)'s requirements, the panel majority in reality demanded no such thing. Rather, it endorsed a rule that imposes no meaningful restraint on plaintiffs asserting a class-wide damages theory. Plaintiffs need only offer a theory that might "evolve" to become the kind of proof that would actually justify class-wide treatment—indeed, the panel majority expressly acknowledged that its rule would accommodate "speculative" methodology. That is no hurdle at all, and it is certainly not the genuinely rigorous threshold showing of "significant proof" reaffirmed in *Dukes*. 131 S. Ct. at 2553 (quoting *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 159 n.15 (1982)).

A. The Decision Below Eviscerates The Rule 23(b)(3) Inquiry

To understand why affirming the decision below would be disastrous for companies that deal with class-action litigation on a daily basis, it is necessary first to appreciate just how low the court of appeals set the bar. Troubling legal principles lurk in the panel majority's opinion—propositions that, if taken at face value, would permit almost *any* proposed class to claim that damages could be measured on a class-wide basis.

1. *Evolution.* In its lengthy footnote responding to Judge Jordan's statement that *Daubert* should apply to expert opinions offered at the certification stage, the panel majority made a startling confession: Not only is it unnecessary for such an opinion to survive the *Daubert* threshold, but the opinion need not even be close to passing. So long as "an expert is presenting a model which *could evolve* to become admissible evidence," that is sufficient. Pet. App. 44a n.13 (emphasis added). But almost anything could be described as capable of such "evolution."

Indeed, when the panel majority briefly tried to explain what that concept means, it said only that an acceptable model would be "based on data." *Ibid.* What data? Here, for example, there is great controversy over whether certain counties outside of the Philadelphia Designated Market Area offer appropriate benchmarks by which to compare prices. The panel majority said such questions do not matter at the certification stage, but "data" are entirely

irrelevant to this case if they do not meet that basic condition. Simply put, if the cable market in Chicago is not similar in relevant respects to the market in Philadelphia, an expert might as well be comparing the prices of pizzas to cheesesteaks.

The lack of content in this "evolutionary" test is evident from the panel majority's inability to identify how the district court decided that the plaintiffs' model was sufficient. All the panel majority could say was that "the District Court *likely* determined that Dr. McClave's model could be refined between the time when class certification was granted and trial so as to comply with *Daubert*." *Ibid.* (emphasis added). A district court decision that contains a truly "rigorous analysis" yielding "significant proof" should not require such guesswork by a reviewing court.

2. *(No) Connection.* The panel majority then went a step further. Responding to the concern that the class-wide damages theory failed to distinguish among the four theories of antitrust injury plaintiffs initially asserted—three of which had been rejected by the district court on grounds not disputed on appeal—the panel majority concluded that it was not necessary to link the asserted class-wide damages theory to a particular injury. "At the class certification stage," the panel majority concluded, "we do not require that [p]laintiffs tie each theory of antitrust impact to an exact calculation of damages." Pet. App. 46a. Rather, plaintiffs need only "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Ibid.*

But how can a court be "assured" that damages can be measured and proved on a class-wide basis when the only expert evidence offered does not distinguish between cognizable and legally invalid injuries? The report says only that damages to plaintiffs who suffered a *combination* of injuries are susceptible to class-wide proof; it does not answer whether such proof could suffice for a single injury.

A brief example illustrates the point. Suppose that a class of plaintiffs asserted claims against a state agency under the Equal Protection Clause and 42 U.S.C. § 1983, claiming that the plaintiffs were discriminated against on the basis of their race and height. Suppose further that the plaintiffs offered an expert report concluding that the State tended to promote tall applicants from one particular racial subgroup and that the plaintiffs tended to suffer diminished income and professional opportunities as a result. Discrimination on the basis of height, of course, is not constitutionally cognizable so long as it is supported by any conceivable rational basis. But the hypothesized expert report makes no effort to determine how many plaintiffs were (a) tall, (b) from a preferred or disfavored racial group, or (c) some combination thereof. It cannot reliably opine that a particular form of proof would establish damages to all class members without attempting to isolate the cognizable injuries from the invalid ones. That is, it is not enough to say: "We have a class-wide way to show damages to all plaintiffs, even if we can't tell whether a legally cognizable injury caused those damages."

3. *Speculation.* Last but not least, the panel majority relieved plaintiffs from showing even that a proffered expert report is internally sound. Distinguishing cases in which courts had challenged experts' damages theories on methodological grounds, the court stated that "[w]e have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference *or speculative*." Pet. App. 47a (emphasis added). The court put it just as starkly when rejecting Comcast's specific challenges to the expert's methodology: Such challenges "have *no place* in the class certification inquiry." *Id.* at 48a (emphasis added).

These statements illustrate in dramatic fashion just how low the panel majority set the bar. In the panel's view, a theory of class-wide damages is subject to no significant adversarial testing at the class-certification stage. Plaintiffs need only proffer a theory that the court is willing to accept under the minimal standards described above; a defendant apparently has no meaningful role to play at the certification stage in explaining why the plaintiffs' theory is flawed. That asymmetry leaves courts at a profound disadvantage, because defendants are more likely than the district court to have the expertise and resources to identify flaws in an expert's methodology. The predictable result is certification of classes that should not ultimately pass muster under Rule 23.

B. *Dukes* Demands Much More

As described above, the panel majority did not hold merely that evidence supporting a class-wide

damages theory need not be fully admissible—it eviscerated the class-wide damages element of the class-certification inquiry. Petitioners have explained at length, Pet. Br. 16-49, why that is squarely at odds with Rule 23 and this Court's precedent. It is worth highlighting here three ways in which the panel majority's "close enough" theory of class certification is particularly at odds with this Court's most recent pronouncement in *Dukes*.

For starters, the panel majority misread *Dukes* to contain only a "*hint*[] that *Daubert may* apply for evaluating expert testimony at the class certification stage." Pet. App. 44a n.13 (emphasis added). With respect, that hardly seems a fair characterization of the Court's statement that it "doubt[ed]" the lower court's conclusion that *Daubert* did not apply, followed by the Court's rejection of the plaintiffs' expert opinion. 131 S. Ct. at 2554. And it is far from clear how the panel majority made the leap from that passage in *Dukes* to the *contrary* idea that a district court need only "evaluate whether an expert is presenting a model which could evolve to become admissible evidence." Pet. App. 44a n.13. The Court in *Dukes* said nothing about "evolution" and gave no indication that some lesser version of *Daubert* would apply, much less the heavily diluted standard endorsed below.

The panel majority also overlooked the fact that *Dukes* specifically examined the defendants' objections to the expert testimony offered in support of certification. There, the plaintiffs' expert opined that Wal-Mart operated under "a 'general policy of discrimination'" that he claimed was evidenced by

Wal-Mart's "'strong corporate culture,'" which made Wal-Mart "'vulnerable' to 'gender bias.'" 131 S. Ct. at 2553 (quoting *Dukes* v. *Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004)). The defendant then challenged his opinion in deposition, eliciting testimony conceding that "'he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.'" *Ibid.* (quoting 222 F.R.D. at 192). This Court specifically relied on that objection in holding that the plaintiffs had failed to satisfy Rule 23. In the panel majority's view, however, such questioning of the expert's methodology would have been premature.

Similarly, *Dukes* examined in detail whether the plaintiffs had offered "significant proof" to connect their claim of injury (denial of promotion and higher pay) with "the existence of a class of persons who have suffered the same injury as that individual." 131 S. Ct. at 2553. The Court held that plaintiffs must "bridge[]" the "conceptual gap" between those two allegations, and found such evidence lacking. *Ibid.* Although the issue there arose in the context of Rule 23(a)'s commonality and typicality requirements, the Court's analysis is equally applicable here to the plaintiffs' lack of connection between a particular theory of antitrust injury and the assertion that damages can be proved on a class-wide basis. The panel majority concluded that such connections need not be shown "[a]t the class certification stage." Pet. App. 46a. *Dukes* required exactly the opposite.

* * *

In sum, the decision below and *Dukes* read like two ships passing in the night. The former set an improbably low standard for evidence necessary to achieve class certification, rejecting the need for admissible expert evidence under *Daubert* and dismissing basic logical defects as irrelevant. The latter not only suggested that *Daubert* should apply, but also subjected plaintiffs' evidence to detailed scrutiny. This Court should reaffirm the rigorous analysis required in *Dukes* and expressly hold that admissibility is a necessary precondition for evidence submitted in support of class certification.

II. Delay In Confronting Errors In An Expert's Methodology Coerces Unwarranted Settlements

The premise of the panel majority's reasoning was that defects in an expert's class-wide-damages theory would be addressed later in the proceeding. In practical reality, that premise is false: The vast majority of class actions settle long before trial. As a result, massive sums will be extracted from defendants in cases that have no business proceeding as class actions.

A. Certification Coerces Settlement

The panel majority's desire to defer challenges to an expert's methodology until after certification ignores the indisputable fact that most class actions never see a courtroom. That is because—regardless of whether certification was proper—certified class actions are simply too risky to try. The combination

of thousands of claims into a single lawsuit—subject to a single jury verdict—transforms many otherwise ordinary lawsuits into bet-the-company litigation. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Accordingly, "[w]hatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements." Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006).

That enormous pressure to settle is present even where the merits of plaintiffs' claims are weak. Simply put, a remote chance of a severe outcome is untenable; "defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits." Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000); see also Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 189 (2008) ("[I]f class action certification is granted, defendants are often unwilling to suffer the risks of trial—even in marginal cases—and face enormous pressure to settle the case for a very substantial amount."). Judge Friendly aptly labeled "settlements induced by a small probability of an immense judgment in a

class action 'blackmail settlements.'" *Rhone-Poulenc*, 51 F.3d at 1298 (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

The possibility of error if the case proceeds to trial (or if a defendant mistakenly evaluates the risk of liability) exacerbates that pressure. Suppose, for example, that a defendant faces lawsuits by several thousand plaintiffs claiming a combined $100 million in damages, but the defendant believes those claims are worth no more than $10 million. If the plaintiffs' claims are litigated individually or in smaller groups, errors in determining liability would tend to cancel each other out; the defendant would win some and lose some and eventually something approaching the expected aggregate liability would result. See *Thorogood* v. *Sears, Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010), cert. granted and judgment vacated, 131 S. Ct. 3060 (2011). When the claims are aggregated into a class action, however, the defendant has just one "roll of the dice" to decide the fate of every claim. See *Rhone-Poulenc*, 51 F.3d at 1298. A single error would be so costly that the only rational strategy for defendants is often to settle.

The out-of-pocket costs of litigating class actions also exert pressure on defendants to settle. See, *e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 416-17 (2000) (discussing steep costs associated with litigating class action). Pretrial discovery, for example, is especially costly in class actions, and tends to cost defendants far more than plaintiffs. *Thorogood*, 624 F.3d at 850 ("[T]he pressure on [the

defendant] to settle on terms advantageous to its opponent will mount up if class counsel's ambitious program of discovery is allowed to continue."). Defendants may settle to avoid facing such a massive outlay all at once.

There are still further indirect costs of defending a class action. Resources are diverted from productive activities, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-41 (1975), sometimes causing defendants to forgo millions of dollars in missed opportunities, see Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 374 (2009). Class actions also involve substantial reputational risk—a class action alleging widespread wrongdoing also makes for headlines that corporate decisionmakers are understandably eager to avoid. See Steven B. Hantler, Victor E. Schwartz & Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 COMMLAW CONSPECTUS 7, 10 (2004). Even the *threat* of a "mega-verdict" can cause the defendants' stock price to plummet. See *id.* at 31-32 (describing 30% stock-price dip when plaintiffs' lawyers met with Wall Street analysts about class actions). In today's viral social-media environment, reputational risks are greater than ever.

None of this is a secret—indeed, the class-action-settlement phenomenon is well documented. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002) ("[E]mpirical studies * * * confirm what most class action lawyers know to be true: almost all class actions settle."); see also, *e.g.*, *Shady Grove*

Orthopedic Assocs., P.A. v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."). These pressures explain why plaintiffs fight so hard to certify the biggest class possible. It is also why Rule 23 authorizes interlocutory appeals from class certification decisions. Fed. R. Civ. P. 23(f) Advisory Committee's Notes to 1998 Amendments ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

These pressures have a predictable effect on the quality—or lack thereof—of class actions. "[T]he ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions." S. REP. NO. 109-14, at 21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21; see also *id.* at 20 ("[A] class attorney * * * can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits."). Regrettably, the prophecy that even a meritless class action will settle if certified tends to be self-fulfilling: Each settlement that is extracted from a deep-pocketed defendant encourages the filing of still more frivolous lawsuits—particularly because it is overwhelmingly likely that the merits of the suit will never be tested. See Bone & Evans, *supra*, DUKE L.J. at 1302.

For all these reasons, the panel majority's desire to defer addressing errors or weaknesses in an expert's theory of class-wide damages (or any other showing at the certification stage) is fundamentally misguided. There often is no "later" after a class is certified. Precisely because the class-certification decision significantly impairs the defendant, courts must remain especially vigilant and enforce the proper limitations on the class-action device.

B. The Uncertainty Inherent In The Panel Majority's Rule Magnifies The Pressure To Settle Even Unmeritorious Class Actions

If the risk surrounding *properly* certified class actions coerces unwarranted settlements, the pressure generated by the rule adopted below would be even greater. That is because the panel majority's rule introduces still further uncertainty—indeed, the rule seems to cultivate it.

The panel majority required only that an expert's theory of class-wide damages could "evolve" into admissible evidence by the time of trial; held that a damages theory need not yet identify a particular source of injury; and ruled that an expert may even offer a "speculative" conclusion at the certification stage. All of this gives plaintiffs almost unlimited opportunity to alter their expert theories after certification. If an expert theory offered in support of certification need not even approach standards of admissibility, it may bear only passing resemblance to the theory offered afterward.

That flexibility, in turn, drastically limits a defendant's ability to evaluate the strength or weaknesses of the plaintiffs' expert evidence. It likewise compromises the ability of plaintiffs to evaluate candidly their own case. Setting such a low and malleable bar means that hard questions are neither asked nor answered. The ultimate outcome of these and related issues will therefore remain in doubt beyond the certification stage.

As explained above, uncertainty in certified class actions coerces settlements. The sheer size of a class action significantly increases the likelihood that a defendant will settle the action with little regard to its merits. The aggregation of claims beyond those authorized for class treatment by Rule 23 only adds to those already substantial pressures. If defendants are unwilling to risk proceeding to trial even with a well-developed understanding of the plaintiffs' expert testimony, the additional pressure generated by plaintiffs' opportunity to alter—and, predictably, improve—that evidence after certification will be tremendous.

III. Vigilant Enforcement Of Rule 23's Requirements Is Essential To Prevent Abuse Of The Class-Action Device

Requiring the production of reliable, admissible evidence at the class-certification stage is necessary to rein in widespread misuse of class actions. To be sure, there are those cases in which aggregation is proper and necessary to the fair and efficient adjudication of certain claims. But it is equally—if not more—common that plaintiffs' lawyers seek

certification of cases that lack the cohesion demanded by Rule 23 to generate the settlement pressure described above, reaping significant attorney-fee awards in the process. Defendants' only significant protection against such tactics is the meaningful application of Rule 23's requirements at the certification stage.

Dukes is perhaps the prime example of the need for close scrutiny at certification. That case assembled a staggering 1.5 million plaintiffs claiming employment discrimination at the hands of thousands of decisionmakers across thousands of stores and facilities nationwide. 131 S. Ct. at 2547. Certification was granted by the district court and affirmed by the court of appeals based largely on the plaintiffs' expert's "'social framework' analysis." *Id.* at 2553 (quoting 222 F.R.D. at 152). As noted above, the district court accepted that evidence on the assumption that *Daubert*'s admissibility standard did not apply at the certification stage. This Court ultimately reversed that decision without squarely deciding the *Daubert* issue, but the district court's refusal to demand admissible expert evidence led it to certify a sprawling mélange of claims that had no business proceeding as a single class action.

Dukes is hardly an isolated instance of such overreaching. Class actions continue to be filed in staggeringly large numbers. According to one recent estimate, "about thirty-three hundred new class actions are initiated in federal courts annually." Nicholas M. Pace, *Group and Aggregate Litigation in the United States*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 37 n.9 (2009). Many of those involve claims

or theories of liability or damages that do not appear readily susceptible to class-wide treatment. As a result, the introduction of reliable, admissible expert evidence will be essential to distinguishing potentially valid invocations of the class-action device from those simply seeking to exert settlement or other pressures on defendants.

For example, a district court recently certified a nationwide class of plaintiffs claiming that a retail store's use of elevated "porch-like" entrances violates the Americans with Disabilities Act despite the availability of separate entrances for wheelchair users. See *Colorado Cross-Disability Coalition* v. *Abercrombie & Fitch*, No. 09-CV-02757-WYD-KMT, 2012 WL 1378531 (D. Colo. Apr. 20, 2012). And in *Shields* v. *Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529 (C.D. Cal. 2011), a court certified a class of plaintiffs claiming that the defendant had not allowed special access to park parades for visually impaired patrons.

The point here is not to opine on the underlying merits of these cases; rather, these cases serve simply to illustrate the wide variety of contexts in which the class-action device is successfully employed. Defendants—particularly the large retailers whose interests *amicus* represents—are constantly faced with lawsuits stretching the boundaries of class-wide proof. As in the present case, experts necessarily play an important role in determining whether liability and damages for such a wide variety of claims really can be proved on a class-wide basis. That is why admissible evidence is

essential to avoiding the certification of actions that should not be afforded class treatment.

Some courts take this responsibility seriously and have denied certification to classes where experts cannot demonstrate the necessary connections or where other defects in methodology are apparent. In *Kottaras* v. *Whole Foods Market, Inc.*, 281 F.R.D. 16 (D.D.C. 2012), for example, the district court denied certification because plaintiffs' damages expert's methodology failed to account for products whose prices decreased after the merger. Indeed, the court held that the "low hurdle" for such analysis set by a prior D.C. Circuit decision "now seems inconsistent with what the Supreme Court has articulated [in *Dukes*]." *Id.* at 22. Similarly, in *Roberts* v. *The Scott Fetzer Co.*, No. 4:07-CV-80 (CDL), 2010 WL 3937312 (M.D. Ga. Sept. 30, 2010), the district court rejected expert proof of class-wide damages strikingly similar to that offered here. Seeking to prove damages to plaintiffs who had purchased an appliance not knowing it was refurbished, plaintiffs offered expert evidence of the "but for outcome"—*i.e.*, what a plaintiff would have paid if he or she had been aware of the item's history. 2010 WL 3937312 at *11 n.13 (internal quotation marks omitted). The district court rejected the expert's theory as "'so insubstantial as to amount to no method at all.'" *Id.* at *11 (quoting *Klay* v. *Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004)).

Class-action practice needs *more*, not fewer, examples of district courts reining in aggressive uses of the class-action device at the certification stage. If the decision below is affirmed, however, district

courts will be almost powerless to question an expert's methodology or to look behind an assertion that class-wide proof is appropriate. The expert theories in either of the above cases, for example, could have been characterized as capable of "evolving" into admissible proof. But delaying the day of reckoning serves no legitimate purpose. It is far better for courts to resolve such questions up front on the basis of competent, reliable evidence than to them unanswered—particularly when the practical consequence of deferring them is that unwarranted settlements will be extracted in larger numbers and at great cost.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
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No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, ET AL.,
Petitioners,

v.

CAROLINE BEHREND, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits. To that end, WLF has participated extensively in litigation in support of its view that federal courts should not certify cases as class actions unless the plaintiffs can demonstrate that they have satisfied each of the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., Conn. Retirement Plans & Trust Funds v. Amgen, Inc.*, No. 11-1085 (dec. pending); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. Dedicated to the just and efficient administration of civil justice, the IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions, which are increasingly global in reach.

Amici are deeply concerned by the proliferation of class action lawsuits being filed throughout the federal court system and the inhibiting effect that such litigation can have on the development and expansion of business. *Amici* believe that the district court's certification decision, if allowed to stand, will only exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes. Because the decision to certify a class is so often outcome determinative, classes should not be certified on the basis of untested expert testimony about damages, as was the case here.

STATEMENT OF THE CASE

Respondents, six non-basic cable television subscribers, allege that Petitioners (collectively, "Comcast") violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 by engaging in a practice called "clustering," whereby Comcast grew its share of the

Philadelphia market by trading cable systems it owned outside of Philadelphia for cable systems owned by Comcast competitors within Philadelphia. Although each of Comcast's acquisitions and "swaps" were approved by the Federal Communications Commission (FCC), Respondents brought suit in the Eastern District of Pennsylvania alleging that Comcast's antitrust violations caused them to purchase cable television at an artificially inflated price, resulting in measurable monetary losses. Pet. App. 5a-7a.

Seeking to represent a class comprised of more than two million current and former cable television subscribers in the Philadelphia metro area, Respondents advanced four theories of alleged antitrust impact by which common damages could ostensibly be measured. The district court rejected three of the four theories at the certification stage. *Id.* at 122a, 153a, 161a-162a.

Respondents asked the district court to certify the class on the remaining theory that Comcast's clustering unfairly deterred competition from "overbuilders"—those companies who offer a "competitive alternative where a telecommunications company already operates." *Id.* at 7a. Comcast objected that even if the alleged deterrence of such overbuilding resulted in an increase in the price of cable, it would not have resulted in the same increase in price throughout the 650 franchise areas of the Philadelphia market. In short, Comcast argued that the court could not assume that the "but-for" market conditions were common or uniform across the Philadelphia market. *Id.* at 82a-83a.

Consistent with black-letter law, the district court and all parties agreed that measureable damages are an essential element of Respondents' antitrust claims. *Id.* at 96a. As a result, Respondents could satisfy Rule 23(b)(3)'s predominance requirement only by establishing common proof of damages on a class-wide basis. Respondents presented the testimony of their damages expert, Dr. James McClave, who opined that damages could be determined on a class-wide basis by calculating the difference between existing cable prices and hypothetical cable prices that would have existed but for Comcast's allegedly anticompetitive conduct. *Id.* at 35a. Although his model purported to calculate damages for each of the sixteen counties comprising Comcast's Philadelphia market, Dr. McClave conceded that his methodology assumed that only five counties "would have been overbuilt." J.A. 1382a.

Comcast objected that Dr. McClave's damages model had been prepared in reliance on Respondents' four different theories of antitrust impact. Pet. App. 186a. Because three of those four theories had been roundly rejected by the court, Comcast argued that Dr. McClave's model could not be relied on to establish class-wide damages as it provided no methodological basis for segregating damages attributable solely to overbuilding. *Id.* at 40a. Comcast also raised objections to many of the assumptions and screens used by Dr. McClave in preparing his damages model. *Id.* 79a-86a.

Nevertheless, over Comcast's objections, the district court certified the class under Rule 23(b)(3). While conceding that Dr. McClave's damages model

had been prepared when Respondents were advancing four theories of antitrust, the court held that the model remained valid because "[a]ny anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties." *Id.* at 186a-187a. The court then concluded that "there is a common methodology available to measure and quantify damages on a class-wide basis." *Id.*

On appeal, a divided panel of the U.S. Court of Appeals for the Third Circuit affirmed. The panel majority declined to address Comcast's objections to the model advanced by Dr. McClave and relied on by the district court. Concluding that Comcast's "attacks on the merits of the methodology" have "no place in the class certification inquiry," the panel announced "[w]e have not reached the stage of determining on the merits whether the methodology [advanced by Dr. McClave] is a just and reasonable inference or speculative." *Id.* at 47a-48a. Seemingly conceding that Dr. McClave's model would not satisfy the standards for admission of expert testimony under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), it was satisfied that the model nevertheless "could *evolve to become* admissible evidence." *Id.* at 44a (emphasis added).

Judge Jordan dissented on the question of common damages, concluding that "Dr. McClave's testimony is incapable of identifying any damages caused by reduced overbuilding" in Philadelphia." *Id.* at 65a-66a. He criticized the majority's "willingness to overlook the debilitating flaws in Dr. McClave's model in an effort to avoid an 'attack on the merits'" as "precisely the kind [of] talismanic

invocation of 'concern for merits-avoidance'" that Third Circuit precedent forbids. *Id.* at 81a n.8 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 n.17 (3d Cir. 2008)). "[W]hether we frame the issue as a question of fit under *Daubert*," Judge Jordan observed, "or simply ask whether the District Court abused its discretion by relying on irrelevant evidence, we are effectively asking the same question." *Id.* at 67a. Because Dr. McClave's model was not limited to the only surviving theory of antitrust impact, Judge Jordan would have vacated the class certification order.

SUMMARY OF ARGUMENT

In affirming class certification, the Third Circuit adopted an alarmingly narrow view of what evidence suffices to satisfy Fed. R. Civ. P. 23(b)(3)'s commonality requirement in a class action. Specifically, the district court relied on the opinion of plaintiffs' damages expert in concluding that commonality was established, but failed at the class certification stage to analyze the reliability and admissibility of that opinion using the standards for doing so established by this Court in *Daubert*.

By electing to defer a true *Daubert* analysis to a subsequent phase of the litigation, the district court, as affirmed by the Third Circuit, effectively breathed new life into the defunct notion of conditional certification. As this Court recognized only last term, because class certification exponentially raises the stakes in litigation, it should not be granted in the absence of reliable evidence that all Rule 23 requirements have been satisfied. This means digging below the surface of a

plaintiffs' expert's testimony on damages and putting his methodology to the test. That such an inquiry overlaps with the merits is no justification for avoiding it.

Likewise, there is no justification for applying a lesser reliability standard at class certification than at any other point in the litigation. Here, the district court's failure to conduct a *Daubert* analysis of plaintiffs' expert's opinion on damages, and the Third Circuit's failure to require one, was a legal error that jeopardizes the rights of Petitioners and absent class members.

The Third Circuit's approach also fails to appreciate the crucial role that certification decisions play in the outcome of high-stakes class-action litigation. Empirical research demonstrates that litigation costs make it very difficult for the party who loses the class certification decision to continue with the litigation—with the result that erroneous certification decisions are effectively unreviewable. In light of that concern, this Court should adopt a clear rule that will encourage district judges to grant certification motions only after first determining the admissibility of evidence relied on by plaintiffs to prove that the requirements of Rule 23 have been satisfied.

ARGUMENT

I. NO JUSTIFICATION EXISTS FOR REQUIRING A LOWER EVIDENTIARY STANDARD AT THE CLASS CERTIFICATION STAGE

Respondents claim the right to sue Comcast

not only on their own behalf but also as representatives of thousands of other Comcast cable subscribers in the Philadelphia metropolitan area. Federal Rule of Civil Procedure 23 imposes numerous requirements on those seeking to maintain such a representative action, including (under the circumstances of this case) a judicial finding "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Certification of a class is appropriate only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *General Tel. Co. S.W. v. Falcon*, 457 U.S. 147, 161 (1982)).

In upholding class certification, the Third Circuit panel concluded that "[w]e have not reached the stage of determining on the merits whether the methodology [relied on by the plaintiffs' damages expert] is a just and reasonable inference or speculative," Pet. App. 47a. But neither inference nor speculation is a proper basis for class certification, even in the Third Circuit. Indeed, "the question at class certification is whether, *if* [damages are] plausible in theory, [they are] *also* susceptible to proof at trial through available evidence common to the class." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 325 (3d Cir. 2008) (emphasis added). Thus, even where a theory is plausible, the relevant question at the certification stage is whether that theory is susceptible to common proof. If the only proof offered is inadmissible expert testimony, then plaintiffs will have failed to meet their burden of showing that the theory of damages, however

plausible, is capable of common proof.

Of course, this court has already established a standard for evaluating the reliability of expert testimony in federal courts. *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). *Daubert* established a non-exhaustive list of criteria to evaluate the reliability, and thus admissibility, of an expert's opinions, including whether the theory has been tested and subjected to peer review and publication, and whether it is generally accepted in the relevant scientific or technical community. 509 U.S. at 593-94.

Likewise, the Advisory Committee's Notes to Federal Evidence Rule 702 recommend additional benchmarks, including whether the expert has accounted for alternative explanations, whether the expert's opinions resulted from independent research or are a product of litigation, and whether the expert was as careful in forming his opinions for litigation as he would be in his non-testifying professional work. *See* Fed. R. Evid. 702. There is no justification for requiring a lower standard at the class certification stage, and every reason to apply the same standard for testing the reliability of expert testimony at *every* stage of the litigation.

The district court below did not conduct a full *Daubert* analysis of the expert testimony supplied by plaintiffs in support of the Rule 23 requirements. Instead of analyzing Dr. McClave's opinions against the criteria established by *Daubert* and Rule 702, the district court improperly relied on the Plaintiffs' expert's "theory" of common damages to certify the class without testing the reliability of his

methodology. Under such circumstances, it was undoubtedly an abuse of discretion for the district court to consider Dr. McClave's opinion as a basis for concluding that damages could be proven using evidence common to the class. As Judge Jordan observed in dissent, "whether we frame the issue as a question of fit under *Daubert* or simply ask whether the District Court abused its discretion by relying on irrelevant evidence, we are effectively asking the same question." Pet. App 67a.

According to the Third Circuit, Comcast's "attacks on the merits of the methodology . . . have no place in the class certification inquiry." *Id.* at 48a. But this Court has never embraced that position. Indeed, only last term, this Court made clear that expert testimony is no different than any other form of evidence relevant to a Rule 23 inquiry, and even went on to question a district court's refusal to conduct a *Daubert* analysis before evaluating whether an expert's testimony supported a finding that Rule 23's requirements were met. *See Dukes*, 131 S. Ct. at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the class certification stage of class-action proceedings. *We doubt that this is so* . . . .") (internal citations omitted and emphasis added).

As Rule 702 makes clear, expert opinion is not admissible simply because it is based on reliable principles and methodology. The application or "fit" of that methodology to the facts of the case must also be reliable. *See* Fed. R. Evid. 702(2)-(3). But here, Dr. McClave premised his damages model on four different theories of antitrust impact. Once the district court rejected three of those four theories,

leaving only the "reduced-overbuilding" theory, Dr. McClave's damages model no longer fit Respondents sole theory of antitrust impact. Nevertheless, the district court accepted Dr. McClave's opinion on damages at face value and relied upon them in finding Rule 23's requirements satisfied—without evaluating those opinions against the *Daubert* criteria. The Third Circuit compounded that problem by holding that a district court must only "evaluate expert models to determine whether the theory of proof is plausible." Pet. App. 44a n.13. But if such expert models are inadmissible under *Daubert*, they should not be considered as evidence for any purpose.

In failing to sufficiently scrutinize the reliability, admissibility, and fit of Dr. McClave's opinions, the district court failed to rigorously analyze Rule 23's class certification requirements. If Dr. McClave's opinions ultimately could not withstand *Daubert* scrutiny, those opinions necessarily fail and thus cannot supply evidence of commonality or typicality, as required by Rule 23(a).

The Third Circuit's decision to affirm the district court's acceptance of Dr. McClave's testimony in support of class certification is not supported by reason or the jurisprudence of this Court. If left undisturbed, the opinion below will have far-reaching and adverse consequences on defendants and effectively return class action jurisprudence to the days of conditional class certification.

II. THE DECISION BELOW IGNORES THIS COURT'S ADMONITION IN *DUKES* THAT COURTS SHOULD NOT AVOID ADDRESSING ISSUES RELEVANT TO CLASS CERTIFICATION SIMPLY BECAUSE THEY ARE ALSO MERITS-BASED ISSUES

The appeals court held that, for purposes of class certification, any arguments that might be said to address the "merits" of Plaintiff's claims were not "properly before" the court. Pet. App. 19a. But this Court has already rejected that view in *Wal-Mart v. Dukes*, holding that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. Rather, a "party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). As a result, courts are required to resolve any "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [those issues] *again* at trial in order to make out their case on the merits." *Id.* at 2552 n.6.

The Third Circuit attempted to support its decision not to address Comcast's objections to Plaintiffs' expert's theory of common damages in support of class certification by insisting that it was foreclosed from addressing those concerns "at this stage of the litigation." Pet. App. at 32a. Under this view,

> If the class proves at trial that Comcast engaged in anticompetitive behavior, it can

> use the constructed "but-for" market to measure the anticompetitive impact on the class members. At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations . . . . We have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculation.

Id. at 46a-47a. In the court's view, because the Plaintiff's theory of damages was a question of fact that *might* be determined later on a class-wide basis, its resolution must await a full-blown trial on the merits.

But the Third Circuit's analysis is based on a serious misunderstanding of this Court's holding in *Dukes*, which repeatedly emphasized that federal trial courts should *not* shy away from delving into issues that touch on the merits of the lawsuit if doing so is necessary to determine whether class certification is appropriate under Rule 23. In *Dukes*, this Court called on district courts to engage in a "rigorous analysis" to determine whether the prerequisites of Rule 23 have been satisfied, and added:

> Frequently the "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be

> helped. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." . . . Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation.

Dukes, 131 S. Ct. at 2551-52 (quoting *Falcon*, 459 U.S. at 160).

As *Dukes* makes clear, such scrutiny is especially warranted in those cases where, as here, money damages are sought: "[W]hen a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Dukes*, 131 S. Ct. at 2558-59. But when it comes to each class member's individualized claim for money damages, "that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority *before* allowing the class." *Id.* (emphasis added).

Notwithstanding this Court's prior holdings, the Third Circuit's position that any issue capable of being resolved on a class-wide basis should not be decided until trial, even when the issue is relevant to class certification, has little to recommend it. Of course, it may sometimes be true that a defendant who disproves a plaintiff's theory of damages also

defeats the plaintiffs' claims on the merits. But even the Third Circuit would surely concede that such a showing also defeats a claim for class certification by demonstrating the absence of the commonality required by Rule 23(b)(3). Under such circumstances, what possible justification remains for allowing class certification to proceed? A court should not make it easier for a plaintiff to win certification and advance to trial in those cases where the defendant has evidence demonstrating that an essential element of the lawsuit cannot be proven. For that reason alone, this Court should reverse the decision of the Third Circuit.

III. FAILURE TO TEST THE RELIABILITY OF EXPERT TESTIMONY AT THE CLASS CERTIFICATION STAGE IS INEFFICIENT AND PREJUDICES ABSENT CLASS MEMBERS

Permitting courts to consider expert testimony in support of class certification without testing its reliability under *Daubert* is inefficient at best and at worst prejudices the parties. Because class certification dramatically raises the stakes of litigation for defendants, often creating insurmountable pressure to settle even weak claims, *see* § IV *infra*, those defendants who bow under this pressure may never get the opportunity to compel the required scrutiny of plaintiffs' experts' testimony.

In class-action litigation, "an order certifying the class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and if the case is settled, there

could not be such an examination)." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (1st Cir. 2004). Moreover, forcing defendants to conduct class-wide discovery and to expend the resources necessary to reach the merits phase of a class action—only to have it determined that the expert testimony on which the class certification decision is based is unreliable—is fundamentally unfair and inefficient.

Even more importantly, the rights of absent class members may be substantially impaired or lost altogether when a class is certified based on unreliable expert testimony that is ultimately excluded following a full *Daubert* review. This is precisely why Rule 23 requires courts to probe beyond the pleadings and scrutinize the evidence to ensure that absent class members' interests are adequately represented and their rights are preserved.

As this Court held in *Dukes*, district courts must resolve any "merits question[s]" that bear on the "propriety of certification under Rules 23(a) and (b)." 131 S. Ct. at 2552 n.6. That is, plaintiffs must bridge the gap between their individual claims of harm caused by an antitrust violation and "the existence of a class of persons who have suffered the *same* injury . . . such that the individual's claim and the class claims will share questions of law and fact and that the individual's claim will be typical of the class claims." *Falcon*, 457 U.S. at 157 (emphasis added). Here, plaintiffs attempted to bridge that gap by offering Dr. James McClave, a damages expert who formulated a model purporting to establish class-wide proof of damages. Pet. App. 165a-187a.

The district court relied on this evidence, without even considering whether the testimony was reliable under *Daubert*, to determine that plaintiffs satisfied the requirements of Rule 23.

Of course, the same evidence would be critical to carrying plaintiffs' burden of proof at trial. If, after conducting the reliability and admissibility analysis required by *Daubert* immediately prior to trial, the district court determines that Dr. McClave's testimony should be excluded, it could have "catastrophic consequences" to absent class members where "the plaintiff loses and carries the class down with him." *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring specially). While the loss of such evidence could lead to a decertification of the class, it may also simply be deemed a failure of proof on the merits, resulting in a defense judgment whose *res judicata* effect binds all class members who did not affirmatively opt out. Such unnamed members of a class action will be bound, "even though they are not parties to the suit." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011). *See also, Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (explaining that "suits with preclusive effect on nonparties include properly conducted class actions"); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication, a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").

A similar harm would occur to class members in this case even if the plaintiffs were to *prevail* at trial and go on distribute damages according to Dr.

McClave's model. That model relies on Philadelphia-wide averages to select benchmark counties, and even then calculates damages only on a county-by-county basis. Because sufficient variations exist among franchise areas to prevent any determination of but-for conditions across the entire Philadelphia market, Dr. McClave's model would inevitably undercompensate some class members (and unfairly overcompensate others).[2] So whether the plaintiffs win or lose at trial, the Third Circuit's approach to class certification has harmful consequences.

Daubert affords another level of protection to absent class members in the Rule 23 inquiry by exposing, at a preliminary stage, expert testimony that is unreliable and would not likely be admissible at a trial on the merits. For, unlike adjudication on the merits, the denial of class certification cannot bind proposed class members. *See Bayer Corp.*, 131 S. Ct. at 2381 n.11 ("The great weight of scholarly authority—from the Restatement of Judgments to the American Law Institute to Wright and Miller—agrees that an uncertified class action cannot bind proposed class members."). It is therefore essential that this Court affirmatively rule that *Daubert*, and not some lesser standard of review, applies at class certification.

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[2] Such a result also raises serious questions under the Rules Enabling Act, 28 U.S.C. § 2072, which was enacted to prevent this very type of expansion or reduction of the substantive rights of class members under the guise of a procedural rule.

IV. BECAUSE CLASS CERTIFICATION DECISIONS ARE SO OFTEN OUTCOME DETERMINATIVE, TRIAL COURTS SHOULD TEST THE RELIABILITY OF EXPERT EVIDENCE AT THE CLASS CERTIFICATION STAGE

Empirical research demonstrates the crucial role that class certification decisions play in the outcome of high-stakes class action lawsuits. Litigation costs make it very difficult for the party who loses the class certification battle to continue with the litigation—with the result that erroneous certification decisions are often effectively unreviewable. In light of that concern, *amici* respectfully urge the Court to adopt clear rules that will encourage district judges to certify plaintiff classes only after they have tested the reliability of any evidence proffered to show that Rule 23 has been satisfied.

As numerous courts have recognized, companies that face a large certified class (and the accompanying enormous potential damages) are "under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied*, 516 U.S. 867 (1995). Unless defendants want to "roll the dice," they must settle—often without regard to the merits of the plaintiffs' underlying claims. *Id.* In many instances, such settlements can legitimately be characterized as "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). *See also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class

certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

Simply put, "the high costs of class litigation after the certification stage create considerable pressure to settle early." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1302 (2002). Once settlement occurs, "the trial judge never gets a chance to revisit the initial certification decision." *Id.* As a result, "initial certification is, as a practical matter, tantamount to final certification for most cases." *Id.* In any event, if a trial judge believes that settlement will likely follow after class certification, "she has little incentive to decertify the class. Accordingly, defendants have little incentive to file motions to decertify." *Id.* By requiring admissible proof of commonality *prior* to class certification, this Court can help guard against a flood of frivolous and vexatious lawsuits.

Careful gatekeeping at the Rule 23 stage helps to ensure judicial efficiency and fundamental fairness. In light of these goals, this Court should adopt a clear rule that will encourage district judges to grant certification motions only after first determining the admissibility of evidence relied on by the plaintiffs to prove that the requirements of Rule 23 have been satisfied. That such an inquiry often overlaps with difficult merits questions is no justification for avoiding it. Because the decision to certify a class is so often outcome determinative, classes should not be certified on the basis of untested expert testimony about damages.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation, Allied Educational Foundation, and International Association of Defense Counsel respectfully request that the Court reverse the Third Circuit's holding below.

Respectfully submitted,

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